Petition

81-1605

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No.

IN THE

Supreme Court of the United States

October Term, 1981

RED BALL MOTOR FREIGHT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board through its regulatory power can manipulate the burden of proof and persuasion to effectively require the reinstatement of an employee discharged for cause in direct controvention of the decisions of this Court; the National Labor Relations Act, as amended; the Federal Administrative Procedure Act, as amended; and the codified Rules and Regulations of the National Labor Relations Board.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

RED BALL MOTOR FREIGHT, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Red Ball Motor Freight, Inc., respectfully prays that a Writ of Certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 5, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 108 L.R.R.M. 3139. The opinion of the National Labor Relations Board and the Administrative Law Judge are reported at 253 NLRB No. 111 (1980). All of the opinions below are appended.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1981. The court denied a timely Petition for Rehearing on December 1, 1981. On January 14, 1982, the court denied a Petition to Stay Its Mandate pending application to this Court for a Writ of Certiorari (an Application for Stay of a Mandate is pending before the Honorable Byron White, Associate Justice of this Court). Petitioner invokes this Court's jurisdiction under 28 USC §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code Title 29:

§157. *Right of Employees as to organization, collective bargaining, etc.*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right refrain of any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this Title.

§158. *Unfair labor practices.*

(a) It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this Title.

§160. *Prevention of unfair labor practices — powers of Board generally.*

(c) ...If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board ... shall issue ... an order ... No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual was suspended or discharged for cause.

United States Code, Title 5:

> §556. *Hearing: Presiding Employees; powers and duties; burden of proof; evidence; record as basis of decision.*
>
> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

Code of Federal Regulation Title 29:

> §101.10 (b) ... The Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act.

STATEMENT OF THE CASE

On April 18, 1979, Petitioner, Red Ball Motor Freight, Inc., discharged Linda Surley (herein "Surley") for her continued disturbance of a work area during working hours, and her refusal to commence work promptly at 8:00 A.M. after Petitioner just sustained the crippling effects of a two week nationwide strike. Surley's continued disruption of the work area and her refusal to work during working hours had been a source of continuous problems between Surley and her department supervisor, Neal Barkley (herein "Barkley"). On at least two prior occasions, Barkley had sought authorization from Mr. W. Jack Tittle, Vice President, Industrial Relations, to discharge Surley for her continued disturbances and refusals to work, but on each prior occasion, Mr. Tittle refused such authorization, the last request being approximately five months prior to Surley's discharge, when Surley was provided with a written reprimand which specifically stated that her continued disturbance of the work area and refusal to work would result in "punitive action".

Surley claimed that she had been discharged for her concerted activities on behalf of herself and her fellow employees and because of her attempts to encourage membership in a labor organization, and charged Petitioner with violations of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act, (herein the "Act"). The General Counsel of the National Labor Relations Board (herein "the Board") filed a complaint alleging such violations, and at the hearing in the matter sought to demonstrate that Petitioner seized upon Surley's disruption of the work area and failure to commence work promptly at 8:00 A.M. as a pretext to rid itself of an employee who was actively trying encourage membership in a labor

organization or otherwise engage in protected concerted activities.

At the hearing before the Administrative Law Judge, (herein "ALJ"), the evidence established that Surley had been employed for approximately nine and one-half years and at the time of her discharge she was employed as a cashier in the revenue accounting department. As a result of the two week nationwide Teamsters strike, which effectively shutdown Petitioner's operation, on April 6, Barkley notified all hourly nonunion employees (including Surley) that effective Monday, April 9, they would be placed on mandatory vacation until further notice. Surley, among other employees, asked Barkley if they could be placed on leave without pay during the strike instead of using their vacation time. Barkley said no and explained, he had been advised that the employees had to use their vacation time. During the course of the meeting, another employee asked Barkley if the employees would be called back by seniority order, and Barkley responded that they would be called by seniority in their jobs.

Subsequent to the April 9, forced vacation shutdown, W. J. Tittle, Vice President, Industrial Relations, was able to effect a change in corporate policy concerning the requirment that the employees use their earned vacation time, and effectuated a policy which would allow them to take their vacations at a later date. However, the employees were unaware of this policy change until sometime after 9:00 A.M. on April 18.

At the time the nationwide Teamsters strike terminated, the Petitioner commenced recalling the employees in seniority order by job, but not by company-wide seniority. Sometime between April 9 and April 18, the day she returned to work, Surley com-

plained to her immediate supervisor, Don Yant (herein "Yant") about Petitioner's policy which forced her to use her vacation time rather than taking a leave without pay.

On Friday, April 13, Surley telephoned Yant and told him that another co-worker and herself had heard that several other employees had been recalled to commence work on Monday, April 16. Yant confirmed that information, and further advised Surley that ten other employees had been noticed for recall by another supervisor. Not understanding that the call back was by job seniority, Surley then complained that both she and another employee had greater company-wide seniority than those recalled in the other department and that since they were both cross-trained to perform the functions, she wanted to know why they had not been called first. Yant simply responded "that's the way it is". At some date prior to April 18, Yant allegedly told his immediate supervisor, the department head, Barkley, of this conversation with Surley. On Tuesday, April 17, Yant called Surley at home for the purpose of recalling her to work the following day, and Surley agreed to return to work on April 18.

On Wednesday, April 18, Surley came to the work area ten to fifteen minutes before 8:00 A.M., and as she started to go to the coffee shop, she made a comment to a fellow employee that she should not commence work before 8:00 A.M. From 8:00 A.M. to approximately 8:20 A.M., the department head, Barkley, observed that Surley was "definitely not working" and that she was talking across the room with other employees, making several trips within the room. Mr. Barkley's observations were confirmed by another supervisor, Mr. West, and at least one other employee, Shirley Richardson. Mr. West having observed Surley's failure to commence work, advised

Mr. Barkley, who noted that he was already aware of that situation. Mr. West further advised Barkley of Surley's comments to the other employees prior to 8:00 A.M. Surley continued not working and walking around the room, talking to her co-workers until approximately 8:20 A.M., when she announced to all present, "Well, I guess I had better go to work or they will fire me."

Barkley, on his way to meet with his immediate superviors to request authority to discharge Surley, stopped by Yant's office and advised him that Surley had not been working that morning and inquired as to whether or not Yant had heard Surley's comments concerning not commencing work until 8:00 A.M. Yant confirmed overhearing the remarks, but indicated that he was unaware Surley had not been working. Yant further mentioned that Surley again complained about the forced vacation policy, which neither Yant nor Surley were aware had already been changed. Barkley then met with his immediate superviors, Wayne Hogan, Vice President, Finance, and W. Jack Tittle, Vice President, Industrial Relations, between 8:30 A.M., and 9:00 A.M. to request authority to discharge Surley.

Barkley advised Messrs. Hogan and Tittle that Surley had again created a disturbance in one of his departments by failing to start work promptly at 8:00 A.M. and that he was tired of her continually disturbing other employees. Barkley explained that since the Teamsters strike, the clerical work was piled up; Petitioner had lost substantial revenue; and in this intense situation, he was of the opinion that the employees should be cooperating with Petitioner. Barkley further advised Messrs. Tittle and Hogan of Surley's pre-8:00 A.M. comments that day; Surley's complaints concerning the forced vacation; and concerning the manner of recall. After reviewing Surley's

personnel file, and noting that among other things, that on two prior occasions, Mr. Tittle had refused Barkley's request for authorization to discharge Surley, Mr. Tittle authorized Barkley to discharge Surley for her continued disturbance of the working area and refusal to commence work promptly at 8:00 A.M. Significantly missing from the ALJ's Decision (App.13-33) and the Decision and Order of the Board (App. 5-11), is Mr. Tittle's uncontroverted testimony at Page 112 of the Transcript to the effect that if Mr. Barkley had reported everything to him as Barkley did, but that Surley had commenced work promptly, Petitioner would "definitely not" have authorized Surley's discharge.

Later in the afternoon of April 18, after all employees had been advised of the change of policy concerning no subsequent vacations, Surley and some other employees decided that it would be "good fun" to post a bogus union meeting announcement for the employees with the home address of Mr. Tittle as being the place of the meeting. Yant became aware of the practical joke, and all the employees treated the matter in a light and joking manner. No evidence was presented that any supervisor other than Yant was aware of the practical joke, and the matter was raised after the decision had been made to discharge Surley.

The ALJ concluded that Surley's discharge had nothing whatsoever to do with Surley's contention that she was discharged for encouraging membership in a labor organization in violation of Section 8(a)(3) of the Act. 29 USC §158(a)(3). However, the ALJ did conclude that Petitioner seized upon Surley's pre-8:00 A.M. comment and her failure to commence work promptly as a "pretext to rid itself of an employee who had demonstrated a growing propensity to engaged in protected

concerted activities." (App. 27-28). The ALJ based his decision on the Board's "in part" test which in essence provided that the discharge was violative of the act if it was even partially motivated by concerted activities, without regard to the true purpose or real motive for the discharge. (App. 27). In its Decision and Order, the Board affirmed the rulings, findings, and conclusions of the ALJ, but in so doing, the Board disavowed the ALJ's reliance on the "in part" test, but rather reviewed the case under the Board's new "but for" test established in its *Wright Line* decision. (App. 5-6).

In a per curiam decision, the Court of Appeals below undertook no analysis whatsoever of the Wright Line "but for" test; confirmed that it misunderstood the entire issue, stating that the Board's decision was based upon a determination that Surley's alleged protected activities were "the motivating factor"; and denied Petitioner's application to set aside the Board's Order, simultaneously granting its enforcement. (App. 1-3). Petitioner's Motion for Rehearing and Motion to Stay Mandate of the Court of Appeals pending this Petition for Certiorari were denied. (App. 85, 87, respectively).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With The Decisions of This Court, When Construing The Act; and The Decisions of This Court In Analogous Title VII Litigation.

The Board's *Wright Line* "but for" test is nothing less than a sham device to provide the Board with the means for reinstating any employee who has arguably participated in concerted activities and then subsequently been discharged for cause. This Court has previously held that the employer's constitutional right to discharge its employees is limited only in those instances where the Board establishes by a preponderance of the evidence that the employer's "true purpose" or "real motive" was to prevent the employee from exercising his rights under the Act. *Radio Officers Union, Etc.* v. *N.L.R.B.*, 347 U.S. 17, 43-44, 74 S.Ct. 323, 337 (1954), *accord, Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 675, 81 S.Ct. 839, (1961); *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 628 (1937); *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, 57 S.Ct. 650, 655 (1937). More specifically, the *Wright Line* "but for" test is identical to the shifting of the burden of proof struck down by this Court in the related Title VII area in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 89 (1981) and previously disavowed by this Court in *Board of Trustees of Keene State College* v. *Sweeny*, 439 U.S. 24, 99 S.Ct. 295, 296, (1979); and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 972, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The Board attempts to justify its "choice" of the *Wright Line* "but for" test, on the premise that this Court has approved the shifting of burden of proof in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274,

97 S.Ct. 568 (1977) where as a result of the employer's admission it had fired the subject employee for speech activity which was later found to fully protected under the First Amendment, this Court fashioned a shifting of the burden of proof. As noted by the First Circuit in its careful analysis of this contention, no such admission of wrongdoing can be presumed in a prosecution under the Act, and the formulation of a rule shifting the burden of proof and persuasion is erroneous. *N.L.R.B.* v. *Wright Line*, 662 F.2d 839, 903-905 at f/n 3-9 (1st Cir. 1981) *Petition for Writ of Certiorari pending, Cause No. 81-987*. (App.42-47). To understand the nature of the Board's application of its proposed *Wright Line* "but for" test, the Court's attention is respectfully directed to the Board's analysis of the test in *Wright Line* wherein it unequivocally states:

> ... First, we shall require that the General Counsel make a *prime facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Then at Footnote 14, the Board then states:

> ... [W]e will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

On the following page in its concluding remarks, the Board then states:

> ... Yet our abandonment of this familiar phraseology [the "in part" test] should not be viewed as a

> repudiation of the well established principles and concepts which we have applied in the past.

(App. 76, 77, and 78, respectively). Succinctly stated, the Board is in reality merely renaming the "in part" test under the guise of this Court's direction from the *Mt. Healthy* decision. Notwithstanding the fact that Board itself acknowledges in its *Wright Line Decision* and *Order* that the "in part" as applied by the Board, its Administrative Law Judges, and the various Courts of Appeals "reveals a picture of confusion and inconsistency" and that "disagreement and controversy are rampant among the various decision making bodies". (App. 64, 67, respectively).

From the decisions of this Court in *Mt. Healthy, supra.*, *Sweeny, supra.*, and *McDonnell Douglas supra.*, the Board seized upon the *Mt. Healthy* approach to avoid any difficulties in contending with the burdens established in *Sweeny* and *McDonnell Douglas*. Petitioner respectfully submits that the proper burden is that set forth by this Court in *Sweeny, McDonnell Douglas*, and more recently, *Burdine, supra.*, which require that an employer bear only the burden of explaining clearly the nondiscriminatory reason for its actions, and not the burden of proof and persuasion as dictated by the Board. A writ should issue to resolve this important question.

2. The Decision Below Implementing The Board Articulated Wright Line "But For" Test Is In Direct Conflict With Provisions of The Act, 29 USC §160(c); Is In Direct Conflict With The Federal Administrative Procedure Act, As Amended, 5 USC §556; And Is In Direct Conflict With The Board's Own Rules and Regulations, 29 CFR §101.10(b) (1977).

The unprecedented establishment of the Board's new *Wright Line* "but for" test, shifting the burden of

proof and persuasion to an employer to establish the negative is in direct conflict with, and totally abrogates the Congressional mandate established by the incorporation of Section 10(c) of the Act, 29 USC §160(c) which provides:

> ... No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

In considering the amendment, the House Labor Committee stated:

> The change...is intended to put an end to the belief..that engaging in union activities carries with it a license to loaf, wander about the plants, refusal to work, waste time, break rules, and engage in incivilities and other disorders, and misconducts ... *The Board may not "infer" an improper motive when the evidence shows cause for discipline.* [*emphasis added*].

H.R.Rep. No. 245, 80th Cong., 1st Sess., 42-43 (1947).

Section 7(c) of the Administrative Procedure Act, 5 USC §556, provides in pertinent part that "as otherwise provided by statute, the proponent of a rule or order has the burden of proof", and this proviso was incorporated in to the Board's own Rules and Regulations at 29 CFR §101.10(b) (1977) which provides:

> The Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act.

As a result of these statutory and regulatory burdens upon the Board, the courts have fashioned a series of presumptions in order to rebut the conclusions resulting from the Board's application of its earlier "in part" test. The First Circuit in *N.L.R.B.* v. *Billen Shoe Co., Inc.*, 397 F.2d 801, 803 (1st Cir. 1968), held that:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive [a motivating factor], but to find an affirmative and persuasive reason why the employer rejected the good and chose the bad one. The mere existence of anti-union animus is not enough.

In *N.L.R.B.* v. *McGahey*, 233, F2d 406, 412-413 (5th Cir. 1956), and its progeny, the Fifth Circuit previously held:

> The employer does not enter into the fray [unfair labor practices] with the burden of explanation. With discharge of employees a normal, lawful, legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference of an illegal-not proper-motive was its cause. An unlawful purpose is not to be lightly inferred. *In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one* ... [emphasis added]

Accord, Syncro Corp. v. *N.L.R.B.*, 597 F.2d 922, 924 (5th Cir. 1979); *N.L.R.B.* v. *Florida Steel Corp.*, 586 F.2d 436, 444 (5th Cir. 1978). The District of Columbia's Circuit in *Midway Regional Joint Board Amalgamated Clothing Workers of America, AFL-CIO* v. *N.L.R.B.*, 564 F.2d 434, 440 (D.C. Cir. 1977), held as a result of the presumption of lawful activity that:

> The burden on the Board is not simply to discover some evidence of improper motive [a motivating factor], but to find an affirmative and persuasive reason why the employer rejected the good cause and chose the an illegal one.

Through the *Wright Line* "but for" test, the decision below is not only in direct conflict with the above specified statutory and regulatory burdens of proof and persuasion, but also, as a practical matter, serves to destroy

legitimate, lawful, and judicially created presumptions based upon the statutory and regulatory provisions. The destruction of these burdens of proof and presumptions is of critical importance, and a writ should issue to resolve this important issue.

3. The Decision Below Exemplifies The Significant and Recurring Problems Concerning The Board's Implementation of Its New Wright Line "But For" Test.

The Board's articulation of the new *Wright Line* "but for" test ostensibly arose as a result of rampant conflicts among the various Courts of Appeals since this Court's decision in *Radio Officers Union of Commerical Telegraphers* v. *N.L.R.B.*, 347 U.S. 17, 74 S.Ct. 323 (1954). As reluctantly acknowledged by the Board in its *Wright Line* Decision and Order:

> ... [T]he conflict over which test to apply in duel motive cases has now spread throughout the circuit courts to the extent that a review of the test currently applied by Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.

251 N.L.R.B. 1083 (1980) (App. 64). Under the new standard, "a picture of confusion and inconsistency" has already arisen concerning the implementation of the Board's *Wright Line* "but for" test. Although the test has been approved by the Fifth Circuit without any analysis whatsoever in this case and two others, *N.L.R.B.* v. *Charles H. McCauley Asso's.*, 657 F.2d 685 (5th Cir. 1981), and N.L.R.B. v. Robin American Corp., 654 F.2d 1022 (5th Cir. 1981), the Fifth Circuit does not understand the Board's application of the test as evidenced by the decision below wherein it states:

> By that test [*Wright Line* "but for"], when the General Counsel had made a prime facie showing that

> Surley's participation in concerted activities protected under Section 7 of the Act was *the motivating factor* in Red Ball's decision to discharge her, the burden shifted to the company to establish that the discharge would have taken place in the absence of the protected conduct. [emphasis added].

As implemented by the Board, the prime facie case is established upon the introduction of evidence of "*a motivating factor*" and not as "*the motivating factor*". Conversely, in *Peavey Co.* v. *N.L.R.B.*, 648 F.2d 460, 461 (7th Cir. 1981), in a case almost identical to this cause, the court in granting Peavey's application to set aside a Board ordered reinstatement under *Wright Line* stating:

> Our review of the record as whole convinces us that Peavey Company met its burden under the Wright Line decision. The evidence showed that although a good typist, Snider was a sloppy worker and had a history of disputes with her supervisors. Peavey disciplined in writing and advised her of possible discharge unless her work record and attitude improved. A few days before her discharge, she refused to insert notices of new pay scales into pay check envelopes she was told to prepare. Snider's discharge was ultimately prompted by her refusal to retype some poorly typed letters.
>
> The Board backed away from the ALJ's determination that Snider's discharge was motivated "in part" by her union activity. *In labeling Peavey's reason as "pretextual", however, the Board relied on the same rationale as did the ALJ. It agreed that Peavey had "tolerated Snider's poor job performance over eighteen months" until she began concerted activities.* The Board also relied on Peavey's demonstrated "animous" towards the timing of Snider's discharge. [emphasis added]
>
> *Peavey's reasons here cannot be labeled pretextual. As Wright Line held, a pretext can be found to exist when the purported rule or circumstance advanced*

> *by the employer did not exist, or was not, in fact, relied upon* [sic]. . . . here, however, it is undisputed that Snider had been disciplined for cause, prior to her contact with the union. Snider testified, in fact, that she went to the union as the result of her discipline. Her prior discipline also undermines the Board's claims that Peavey had tolerated Snider's poor performance without complaint for eighteen months. Unlike *St. Luke's Memorial Hospital, Inc.* v. *N.L.R.B.*, 623 F.2d 1173, 1179 (7th Cir. 1980), *there were independent acts of misconduct at the time of Snider's discharge which justified Peavey's action*. Moreover, an employer's silence does not extinguish its right to discipline an employee whose conduct continues to worsen. [emphasis added].
>
> Once Peavey's reasons for discharge are stripped of the label "pretext", it is apparent it met its burden under the *Wright Line* decision. Even though Snider engage in some protected activity, Peavey showed that she would have been discharged even in the absence of the protected conduct.

The Fifth Circuit grants enforcement, the Seventh Circuit denies enforcement. Similiarly, in disavowing the Board's *Wright Line* "but for" test, the First Circuit unequivocally held that the Board did not have the power to shift the burden of proof in controvention of the Act, 29 USC §160(c), the Administrative Procedure Act, 5 USC §556, and the Board's own Rules and Regulations, 29 CFR §101.10(b). However, the Ninth and Eighth Circuits have reached an opposite result concluding that the shifting of the burden of proof is within the Board's lawful prerogative. *N.L.R.B.* v. *Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981); *N.L.R.B.* v. *Fixtures Manufacturing Corp.*, No. 81-1398 (8th Cir. Jan. 14, 1982). Like the Fifth Circuit, the Sixth Circuit has apparently adopted the *Wright Line* "but for" test, but without

explanation or analysis. *N.L.R.B.* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981).

The significant and recurring problem of the effects of the new *Wright Line* "but for" test already reveals a picture of confusion and inconsistency which only this Court can clarify. Petitioner respectfully submits that the Board, all affected employers, and employees, should be governed by this Court's analysis rather than a result dictated by hap and circumstance. A writ should issue in this cause to resolve these important and recurring significant issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES H. BAUMGARTNER, JR.
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the accompanying Appendix have been served upon the Respondent, The National Labor Relations Board and upon the Solicitor General, Department of Justice, by posting the same in the United States mail, postage prepaid, on this the 27th day of February, 1982 to:

Mr. William A. Lubbers
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, Northwest
Washington, D.C. 20570

and to:

Mr. Andrew F. Tranovich, Attorney
Division of Enforcement Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, Northwest
Washington, D.C. 20570

and three additional copies to:

The Solicitor General
Department of Justice
Washington, D.C. 20530

/s/JAMES H. BAUMGARTNER, JR.

Appendix

81-1605

No.

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

RED BALL MOTOR FREIGHT, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES H. BAUMGARTNER, JR.
Vial, Hamilton, Koch, Tubb, Knox & Stradley
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United States Court of Appeals
For the Fifth Circuit

RED BALL MOTOR FREIGHT, INC.,
PETITIONER—CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT—CROSS-PETITIONER

No. 81-4012

PETITION FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
AINSWORTH, INGRAHAM, AND TATE,
Circuit Judges.

James H. Baumgartner, Jr., Vial, Hamilton, Koch, Tubb, Knox and Stradley, was on the brief for petitioner—cross-respondent.

Andrew F. Tranovich, Attorney, with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, were on brief for respondent—cross-petitioner.

November 5, 1981.

PER CURIAM:

The employer ("Red Ball") petitions to set aside a remedial back pay and reinstatement order entered by the National Labor Relations Board against it, and the Board cross-petitions for enforcement of the order.

Red Ball had discharged its employee, Linda Surley, at the close of a work day, allegedly because she had been dilatory in commencing work at her desk at 8:00 A.M. that morning. On a complaint to such effect by the Board's regional director, the Administrative Law Judge (the ALJ) had held, after hearing, that the discharge was based on Surley's protected concerted activities in protesting and objecting to certain employment practices by Red Ball that were unfavorable to its clerical employees. On analysis of the record evidence, the ALJ concluded that Red Ball "seized upon" the failure of Surley (an employee of 9½ years tenure) "to commence work promptly at 8 A.M. as a pretext to make its true motivation, i.e., to rid itself of an employee who had demonstrated a growing propensity to engage in protected concerted activities."

The Board affirmed the rulings, findings, and conclusions of the ALJ. Red Ball Motor Freight, Inc. and Linda Surley, 253 NLRB No. 111 (1980). It agreed that the activities in which Surley had been engaged were protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, as "concerted activities for the purpose of collective bargaining or other mutual aid or protection" with respect to the terms and conditions of employees. It upheld the unfair labor practice under Section 8(a)(1), 29 U.S.C. § 158(a)(1), as found by the ALJ, in that Red Ball had interfered with or coerced the employee in her exercise of her protected concerted activities conduct. In doing so, however, the Board analyzed the issue in the light of its own recent decision in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980). By that test, when the General Counsel had made a prima facie showing that Surley's participation in concerted activities protected under Section 7 of

the Act was the motivating factor in Red Ball's decision to discharge her, the burden shifted to the company to establish that the discharge would have taken place in the absence of the protected conduct; Red Ball having failed to rebut the prima facie showing, the Board concluded that Red Ball had failed to show that, absent Surley's protected activities, her discharge would nevertheless have occurred.

Red Ball challenges the Board's *Wright Line* shift of the burden of proof in mixed-cause discharges (i.e., at least partially based on protected conduct and also allegedly based on good cause), as improperly requiring an employer to prove its innocence and as in derogation of the right of management to discharge employees for cause, see, e.g., Section 10(c) of the National Labor Relations Act. Another panel of this court, however, recently indicated no disapproval of the Board's use of the *Wright Line* test in determining whether, after a prima facie case of discharge for protected activities has been established, the "good" cause assigned was indeed the real reason rather than pretext for the discharge. *N. L. R. B. v. Charles H. McCauley Associates*, 657 F.2d 685 (5th Cir. 1981). Moreover, substantial evidence in the present record as a whole, as the Board's decision states, "amply supports the Administrative Law Judge's findings that Surley's growing propensity to engage in protected concerted activities caught the attention of Respondent's management, which was then motivated to engage in special surveillance of her work performance and to seize upon her first alleged transgression as a pretext to terminate her."

Accordingly, the petition for review of the order of the Board will be DENIED. The Board's cross-petition for enforcement of its order will be GRANTED.

ORDER ENFORCED.

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RED BALL MOTOR FREIGHT, INC.
and
LINDA SURLEY, an Individual

Case 16-CA-8556

December 19, 1980

DECISION AND ORDER

On February 20, 1980, Administrative Law Judge Leonard N. Cohen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions, of the Administrative Law Judge as modified herein, to modify his remedy,[2] and to adopt his recommended Order.[3]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

253 NLRB No. 111

[2] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[3] We have modified the Administrative Law Judge's notice to conform with his recommended Order.

In adopting the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) of the Act by discharging Surley on April 18, 1979, we do not rely on his application of the "in part" test to find the violation. Rather, we analyze this case in light of our recent decision in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980). Employing the test, set forth therein, we find that the General Counsel has made a *prima facie* showing that Surley's participation in concerted activities protected under Section 7 of the Act was the motivating factor in Respondent's decision to discharge her and that Respondent has failed to rebut that showing.

We agree with the Administrative Law Judge's conclusion that employee Surley's complaints to management regarding the order of recalling employees and the requirement that employees use their vacation time during the forced layoff were protected concerted activities which led to her unlawful discharge by Respondent. Surley's complaint to her supervisor, Yant, on behalf of herself and a coworker over Respondent's failure to honor its commitment to observe lines of seniority in recalling employees from the layoff certainly constituted an effort to gain a benefit not only for herself but for her coworker, Cox, and other senior employees as well. See *N.L.R.B.* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 717 (5th Cir. 1973). The recall of employees by seniority favored not only Surley but other laid-off employees including Cox, who was specifically mentioned by Surley in her conversation with Yant. Surley's grievance over the manner in which the recall was being handled was designed to protest the detrimental effect of Respondent's procedure on a group of employees that included Surley and Cox and it is apparent that her complaint was

not solely made to resolve a personal problem but rather with the welfare of her coworkers in mind. See *N.L.R.B.* v. *Sencore, Inc.*, 558 F.2d 433 (8th Cir. 1977).

In addition, our review of the record reveals that Surley engaged in another protected concerted activity relied on by Respondent as one of its reasons for discharging her. Specifically, we note the testimony of Respondent's revenue accounting and collections department director, Barkley, who stated that he personally terminated Surley because, in addition to her complaining about the manner of recall and forced use of vacation during the layoff, she made a comment to other employees in a work area urging them not to start work early. We find that Surley's comment, made in the presence of her coworkers, to employee Davis that Davis should not start work until the time set by the Employer was an attempt to induce fellow employees not to perform work for which they would not be paid. Surley's remark constituted an action by an individual seeking to solicit protected group activity and was thus concerted in nature. The courts have held that such activity by a single employee in attempting to enlist the support of her fellow employees for their mutual protection is as much a concerted activity as is ordinary group activity. *Owens-Corning Fiberglass* v. *N.L.R.B.*, 407 F.2d 1357 (4th Cir. 1969); *Richardson Paint Co. Inc.*, v. *N.L.R.B.*, 574 F.2d 1195 (5th Cir. 1978); *Dreis & Krump Manufacturing Co., Inc.*, v. *N.L.R.B.*, 544 F.2d 320 (7th Cir. 1976).

Under *Wright Line, supra*, this evidence by the General Counsel demonstrating concerted protected activity by the alleged discriminatee and Respondent's reliance on that conduct as a ground for its action against the alleged discriminatee effectively shifted the burden

to Respondent to show that the discharge would have occurred even in the absence of Surley's protected activities. Respondent contends that Surley was not terminated for her complaints concerning the forced use of vacation, manner of recall, or comment to her coworkers, but rather for her alleged refusal to commence work promptly at 8 a.m., on April 18, 1979, which allegedly caused a disruption in her work area, and for her generally "poor attitude." However, even if Surley did fail to start work promptly at 8 a.m., on April 18, 1979,[4] it is clear that Respondent was motivated by her protected activity to seize the first possible excuse it could find to terminate her. In so finding, we rely on the admission of Respondent's witness Barkley, who testified that Surley's complaints about recall and forced vacation and her comment not to start work early were a "chain of events" that caused him to "watch" her. He testified that after being told on the morning of April 18 that Surley "had made a comment in a work area which I didn't feel like helped our work conditions... I started watching her." Barkley also testified, however, that while he observed her allegedly disruptive behavior he made no attempt to stop her. Further, an earlier, more disruptive incident caused by employee Cox had resulted only in a 1-day suspension. This testimony, and the record as a whole, amply supports the Administrative Law Judge's findings that Surley's growing propensity to engage in protected concerted activities caught the attention of Respondent's management, which was then motivated to engage in

[4] The Administrative Law Judge failed to resolve the conflicting testimony in the record as to what time Surley began working on April 18 and, instead, treated the resolution of this credibility issue in a light most favorable to Respondent. As is detailed above, ascertainment of the exact time Surley began work on the date in question is unnecessary in determining whether a violation of the Act has occurred.

special surveillance of her work performance and to seize upon her first alleged transgression as a pretext to terminate her. Respondent has failed to rebut this showing by the General Counsel and we therefore conclude that it has failed to meet its burden that absent Surley's protected activities her discharge would have occurred. Accordingly, we adopt the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) of the Act by discharging Surley for engaging in protected concerted activities under the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Red Ball Motor Freight, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. December 19, 1980

HOWARD JENKINS, JR., *Member*

JOHN A. PENELLO, *Member*

JOHN C. TRUESDALE, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge any of our employees because they engaged in protected concert activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Linda Surley immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings, plus interest.

RED BALL MOTOR FREIGHT, INC.

_____

(Employer)

Dated_____

By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817-334-2941.

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RED BALL MOTOR FREIGHT, INC.

and

LINDA SURLEY, An Individual

Case No. 16-CA-8556

KATHLEEN AURE, ESQ., of Fort Worth, Tex., for the General Counsel.

VIAL, HAMILTON, KOCH, TUBB, KNOX & STRADLEY by JAMES H. BAUMGARTNER, ESQ., of Dallas, Tex., for Respondent.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge: This matter was heard before me on November 15, 1979.[1] On July 19, the Regional Director for Region 16 of the National Labor Relations Board issued a complaint and notice of hearing based upon unfair labor practice charges filed on June 19, alleging the Respondent discharged Linda Surley on or about April 18 in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.*, herein called the Act.

All parties have been afforded full opportunity to appear, introduce evidence, to examine and cross-exam-

[1] Unless otherwise stated, all dates occurred in 1979.

ine witnesses, to argue orally and to file briefs. Counsel for both parties filed briefs, which have been carefully considered.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that at all times material, it has been a Delaware corporation with an office and principal place of business in Dallas, Texas, where it is engaged as an interstate motor common carrier of freight. In the past fiscal year, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Texas directly to points outside the State of Texas. Accordingly, I find that at all times material herein Respondent has been and employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Except where specifically noted, the following facts are not in dispute. Prior to her discharge on the afternoon of Wednesday, April 18, Linda Surley, the Charging Party herein, had been employed as a clerical in Respondent's Dallas facility for approximately 9½ years. At the time of her discharge, Surley was employed as a cashier in the revenue accounting subdepartment under the direct supervision of Don Yant, one of the three

supervisors in the revenue accounting and collections department. Neal Barkley, the director of the entire department, was the immediate supervisor of Yant.

On April 1, Respondent's truckdrivers joined the nationwide Teamster strike and on April 6, Barkley met with all the hourly nonorganized employees in his department and announced that effective Monday, April 9, they would all be placed on mandatory vacation until further notice. Surley, at this time, asked Barkley if the employees could simply be put on leave without pay during the shutdown rather than using their vacation time. Barkley responded that he was merely informing the employees of management's prior decision and they would be forced to use their earned vacation time if they had any left. During the course of this meeting, another clerical employee asked Barkley if the employees would be called back by seniority. Barkley answered that they would be called back by seniority and jobs but that there would be no training given immediately upon recall.

Sometime between April 9 and April 18, the day she returned to work, Surley stopped by the office to pick up her paycheck. While in the office, Surley complained to Yant about Respondent's policy which forced her to use up her vacation time rather than permitting the employees to take leave without pay.

On Friday, April 13, Surley called Yant and told him that she and a co-worker, Gladys Cox, had heard that some of the other employees had already been called to return to work and asked if she and Cox would also be recalled at that time. Yant answered that he had only four employees being recalled and that Surley and Cox would not be included in the initial group. Surley then asked about one of the other two subdepartments within the revenue accounting and collection department. Yant

answered that 10 employees had already been called back by the collection supervisor. Surley at this point angrily stated that both she and Cox had greater seniority than those recalled employees in the collection subdepartment and since both she and Cox were cross-trained to perform those functions, she asked why they had not been called back. Yant simply answered that "that's the way it is."

At some point prior to April 18, Yant informed Barkley that he had spoken to Surley on the phone and reported that Surley was quite disturbed by the fact that she was not one of the first employees called back. Barkley denied that Yant told him that Surley also was disturbed by Respondent's failure to call back Cox prior to April 18.

On Tuesday, April 17, Yant called Surley at home and asked her to come back to work on the following day. Yant further stated that if she did not return to work for the remainder of that week, the additional days would be charged as vacation time. Surley agreed to return on April 18.

On the morning of April 18, Surley reported to work at about 10 to 15 minutes before 8, went to her department, put her purse in her desk and, accompanied by Cox, started to go to the coffee shop. As she and Cox were leaving the work area, they passed the desk of Renee Davis, another clerical employee. Davis was already seated at her desk going through the mail that had accumulated while she had been on lay off. Surley stated to Davis that she (Davis) should not go to work since it was not yet 8 a.m. Davis simply laughed and continued to work.[2]

---

[2] The above account is based on the credited testimony of Surley, Cox and Davis. A fourth clerical employee, Shirley Richardson, apparently overheard

Surley testified that she made the remark in question since the employees had always been informed by management that they were not to go to work before 8 a.m. and were to be sure to leave by 4:30 p.m.[3] Surley further testified that the employees had received several memoranda regarding their times of work and the fact that they were not to be at their desks working at any other times.

Prior to Barkley's arrival in the department approximately 4 years ago, the department operated on a much less strict schedule. Employees were permitted to either come in early or stay late in order to make up for doctor's appointments and the like. However, apparently employees abused this policy which was subsequently abolished and the new stricter policy was established and carefully policed by the supervisors.[4] According to Barkley, his operation has virtually no overtime and any overtime would have to be specifically authorized by either himself or one of the first line supervisors.

At about 8:15 that morning, Raydean West, one of the other department supervisors came to Barkley and repeated to him Richardson's version of Surley's earlier remark to Davis. Apparently, West also informed Barkley that Surley was not at her desk working for the first 15

---

this passing remark as well. According to Richardson's account, Surley "was telling everybody" not to go to work before 8 a.m. because they didn't "owe Red Ball anything." I do not credit Richardson's account which impressed me as rank exaggeration given by an apparently unfriendly co-worker over the mutually corroborated version set forth above. Yant was apparently also in the area at the time Surley made the comment to Davis. According to Yant's somewhat hazy and halting recollection on this point, Surley told Davis not to go to work before 8 a.m. "because — something about Red Ball couldn't afford to pay them." Like Richardson's, Yant's version is not credited.

[3] Respondent did not have a timeclock for use by the clerical employees.

[4] On this point, Barkley testified he wanted people at their work stations at 8 a.m. and wanted them out at 4:30 p.m.

minutes of the workday. Barkley testified that even before this conversation with West, he had, from his office, observed Surley walking around the office not performing her duties.[5] Barkley testified that after West left his office, he continued to watch Surley and observed that she was not at her desk.

At about 8:25, or shortly thereafter, Barkley left his office and went into Yant's.[6] Barkley told Yant that he did not feel that Surley had been working that morning and then asked if Yant had overheard Surley's comment to Davis. Yant answered that he had heard Surley tell Davis not to go to work before 8 a.m. "because something about Red Ball couldn't afford to pay them." During the course of this conversation, Yant mentioned to Barkley that just that morning, Surley had again complained about the forced vacation policy.

A dispute exists over the question of whether Surley actually started work at 8 a.m. as she testified,[7] or whether she wasted the first approximately 15 to 20 minutes of the workday walking around the room talking to her co-workers as testified by Barkley, Richardson and West.[8] I do not need resolve this issue and will for the

[5] The window of Barkley's office faced the clerical's work area.

[6] According to Barkley, Surley had by this time returned to her desk.

[7] To corroborate this claim, the General Counsel questioned employees Cox and Davis. Davis testified that although she had no personal knowledge of whether Surley immediately went to work on the morning of the 18th, she did not recall any disturbance or noise during the first half hour of work that day. Cox, whose desk is located with a good view of the entire room, testified that she did not observe Surley walking around the room between 8 and 8:30.

[8] Richardson testified that she observed Surley after 8 a.m. and that Surley was not at her desk but walking around the room talking to various people at their desks. Richardson also testified that she overheard Surley state at about 8:15 "Well, I guess I'd better go to work or they will fire me." Richardson reported Surley's not working to her immediate supervisor, Raydean West. West then observed Surley walking around the room and, as set forth above, reported this behaviour to Barkley.

purposes of this decision treat the resolution of this credibility question in the light most favorable to Respondent.

Sometime between 8:30 and 9 a.m. that morning, Barkley met with his immediate supervisors, Wayne Hogan, Vice President, Finance and W. Jack Tittle, Vice President of Industrial Relations.[9] Barkley informed Tittle and Hogan that Surley had created the disturbance in one of his departments, had failed to start work promptly at 8 a.m. and that he was tired of her continuing disturbance of other employees. Barkley further explained that since the Teamster strike, the clerical work was piled up and Respondent had lost substantial revenue and that in this intense situation, the employees should be cooperating with the Company. Barkley then recommended that he be authorized to discharge Surley.

That Barkley did not rely solely on Surley's comment to Davis that morning and the fact that Surley did not immediately commence work at 8 a.m. is demonstrated by the following testimony of Tittle.

> Q. [By the Judge] Did Mr. Barkley in describing the situation in his recommendation — did he mention that her attitude — that he considered her attitude negative?
>
> A. Yes he did.
>
> Q. Did he state in describing this attitude her complaining about the vacation matter?[10]

---

[9] The following account is a composite of the testimony of Barkley and Tittle. Hogan did not testify.

[10] Subsequent to the April 9 layoff, Tittle was able to effect a change in corporate policy concerning requiring its clerical employees to use their earned vacation time during the Teamster strike. Sometime during the morning of April 18, after 9 a.m., Yant informed the clerical employees that they would be able, if they wished, to complete heir scheduled vacations as planned and be permitted to take necessary time off without pay.

A. Yes. He made us aware of that.

Q. Did he state anything regarding her complaining about recall?

A. Yes.

The three then reviewed Surley's personnel file and Tittle and Hogan concurred with Barkley's recommendation that Surley should be discharged.[11]

Respondent utilizes an annual employee appraisal form and all witnesses at hearing agreed that Surley's work had never been rated less than good and that she was an excellent worker when she applied herself. All witnesses also agreed that Surley's annual appraisals also consistently contained negative comments that she got along too well with the other employees and that she talked too much.[12]

Both Barkley and Tittle testified that on at least two prior occasions, Barkley had unsuccessfully sought authority from his supervisors to discharge Surley. The last of these preceding the instant matter, took place in November 1978.[13] On that occasion, Surley received a written reprimand from Yant for "constantly chattering while doing her job." This reprimand also stated that Surley had been informed that if she failed to cooperate, Yant would be forced "to take punitive actions."[14]

At the same time that Surley received her written warning, Cox received a 1-day suspension for disturbing

[11] The subject of whether any discipline less severe than discharge was not discussed at this meeting.

[12] Surley's annual 1977 pay raise was withheld apparently because of excessive talking. At that time, at least four other employees also had their annual pay raises withheld.

[13] No evidence was offered as to when the first incident took place.

[14] Surley testified without contradiction that Yant told her at the time that he did not feel she needed the warning at that time but that he had been forced to give it to her because West brought "the matter" to Barkley's attention.

people. When asked by counsel for Respondent to explain why Surley was discharged when Cox only received a 1-day suspension, Barkley testified:

> A. Cookie Cox's event was a very loud noise. There were several people involved in popping gum and I considered it a deliberate attempt to discredit management and disturb the work area. It was not an event that had happened before. It was an extremely noisy happening.
>
> Q. [By Mr. Baumgartner] Now with regard to Mrs. Surley?
>
> A. This was a continual process that had been going on for a year. She had had discussions with her supervisor and myself.[15]

Surley testified without contradiction that at no time between the November 1978 incident described above and April 18, did Yant ever have any further discussions with her regarding her talking at work.

The evidence offered relating to the 8(a)(3) allegation is somewhat hazy. Apparently during the course of the employees' afternoon break on April 18, some of the clerical employees, including Surley, got together and decided that it would be good fun to post a bogus union meeting announcement for clerical employees with the home address of one of the Respondent's vice presidents. Yant became aware of this practical joke before any notice was posted and Yant and all the employees involved apparently treated the matter in a light and joking manner. No evidence was presented that any

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[15] Barkley testified that although he spoke to Surley on several occasions and told her that her actions "were not becoming to an employee," he never, prior to April 18, ever warned her that she faced possible discharge for a continuation of such actions or conduct.

supervisor other than Yant was aware of this abortive practical joke.

Surley testified that during the week and a half she was off between April 9 and April 18, she did have discussions with various clerical employees to the effect that if the clericals had been represented by a union they would have been called back by seniority. There is no evidence that any supervisor was aware of these conversations prior to Surley's discharge.

The only evidence presented relating to any discussions she had with any supervisor regarding the Union concerned a passing remark she made to Yant during the discussion over the "union notice." During the course of her conversation with Yant, the fact that she believed that if the clericals had been represented, they would have been called back by straight seniority. This conversation took place at the afternoon break well after the decision on Surley had been made exclusively by Yant's supervisors. Again, no evidence was offered that Yant informed his supervisors of Surley's opinion in this regard.

At about 4:20 on the afternoon of April 18, Barkley called Yant to his office and informed him that Surley was going to be discharged.[16] At about 4:25, Surley was summoned into Barkley's office. According to Surley, Barkley told her that he had heard of her remark to Davis prior to 8 a.m. Barkley then stated that he understood that Surley did not like the procedure in calling people back to work. Surley answered that it was fair in

[16] At no time that day had the subject of possible discipline of Surley ever been discussed with Yant. Yant testified that on other occasions when employees under his direct supervision had been terminated, he knew of this decision more than 5 minutes before the employees actually received notification.

her room[17] but not fair overall. Barkley then stated that he had had no recourse but to terminate her and he handed her her checks. When Surley asked why, Barkley simply replied words to the effect that he had no other choice. Surley then asked if Yant had anything to do with the decision and Barkley answered "no" that it had been his (Barkley's) decision.

Barkley's version of the conversation is essentially consistent with that of Surley's. Barkley's description is chronicled in the folowing lengthy and rambling testimony:

> Q. [By Ms. Aure] So let me understand the reasons you fired Linda were because she didn't go to work right away that morning — she didn't do her work?
>
> A. That and her general attitude, yes.
>
> Q. She was in the office though?
>
> A. She was in the office. She was in the work area.
>
> Q. Is there any other reason she was fired?
>
> A. Just her general attitude and the fact that she was not working that morning.
>
> Q. Did you tell anybody that she was fired because she was too outspoken?
>
> A. Possibly that was one of the reasons I came up with in our discussion. The fact that I had had problems with Linda in speaking out and disturbing the work area. She had been talked to in the past of being involved in disturbances with me and her supervisor.
>
> Q. Did you tell Linda when you had the conversation with her on the afternoon of April 18 when

[17] Apparently referred to Yant's subdepartment.

you terminated her that she was being terminated because she had been walking and not doing her work that morning?

A. I told Linda there were a chain of events that caused me to watch her: the conversation that she had with Don about not being brought back in the order she deemed she should be; she was complaining about — she was called in and she was very outspoken about forced vacation; and that fact that I understood she had made a comment in the work area which I didn't feel like helped our working conditions.

Q. What comment was that?

A. She made a comment to some people that they did not need to go to work early and that was the conversation, actually what Mr. West had told me.

Q. Do you have any knowledge of when that comment was made?

A. It was made prior to 8.

Q. Prior to 8?

A. Uh-huh. So I guess that fact that he told that she had made it — so I started watching her. I relayed that to her and I did tell her that I observed the fact that she did not go to work. That these incidents and based on the fact that we had had problems with her in the past of disturbing the work area that I made the decision to terminate her.

That same afternoon, Surley, at Yant's suggestion, went to Tittle's office and asked if he could intervene on her behalf. Tittle said he would see what could be done. The folowing day, Tittle informed Sruley by phone that he could do nothing as things were out of his hands.

On April 20, Surley's husband called Barkley and asked why his wife had been fired. Barkley explained that she had been fired for making a remark at 10 before 8 a.m. on the morning of April 18 and that it was "detrimental to his character or the character of the personnel at Red Ball" and that he (Barkley) felt that Mrs. Surley was too outspoken to work for Respondent.

III. Analysis and Conclusions

Based upon the record set forth above, I conclude that Respondent's discharge of Linda Surley on the afternoon of April 18 was in violation of Section 8(a)(1) of the Act. In my view, Surley was not discharged as Respondent contends in its post-hearing brief solely because she "elected not to commence work promptly at 8 a.m. but rather ... elected to talk across the room, walk around and otherwise disobey the company rule concerning starting time and her prior warnings concerning her 'mouth problems.'" The existence of other factors which motivated Respondent in reaching its decision is amply demonstrated by a review of the testimony of Barkley and Tittle, two of the three management officials responsible for her discharge.

In this regard, Barkley testified that in informing Surley of her discharge, he stated that her complaints regarding the order of recalling employees and the requirement that employees must use their vacation time during the layoff caused by the Teamster strike, as well as her comment to a fellow employee in the work area at 7:50 that morning, were part of the chain of events that caused him to watch her.

Further, Tittle testifed that Barkley, in presenting his case for authorization to discharge Surley, specifically informed Tittle and Hogan of Surley's complaints about

the recall and forced vacation issues and that he (Barkley) considered these matters as components in and examples of Surley's overall negative attitude.

With regard to the recall procedure, Surley, in voicing on April 13 her opposition to which she felt was a deviation from Respondent's April 6 assurance that employees would be recalled by seniority and jobs was, as Yant admitted, speaking both for herself and her coworker Gladys Cox. That Yant, in informing Barkley of Surley's conversation with him,[18] did not specifically tell him that Surley was also speaking on behalf of Cox is of little moment. Surley's complaints were topics of common interest and concern of all the clerical employees in the department that were on layoff and of possible benefit to a portion of that group, and thus a protected concerted activity within the meaning of the Act. *Hansen Chevrolet*, 237 NLRB No. 89 slip op. p. 14; *Fairmont Hotel Company*, 230 NLRB 874, 878; *ARO, Inc.*, 227 NLRB 243.

Similarly, Surley, in both the meeting with Barkley on April 6 and in at least two separate conversations with Yant prior to her discharge, voiced her opposition to Respondent's announced policy of forcing the clerical employees to use up their earned vacation while on layoff. Barkley admitted that he had been informed by Yant of Surley's continued opposition to this policy. Like Respondent's method of recalling laid off employees, the forced vacation issue was clearly a subject of common interest and concern to all the clerical employees.[19] See

[18] Respondent in its brief points out that at one point during the hearing, Surley described her April 13 phone call with Yant as "merely an inquiry." While that may be true, as noted in the facts section above, Barkley himself testified that Yant informed him that Surley was "quite disturbed" over the matter.

[19] Respondent contends that the "forced vacation" issued as a possible

Hansen Chevrolet, supra, and the cases cited in the preceding paragraph. Further, that Surley was not specifically chosen as the spokesperson by the employees to speak for them in discussions with supervision is irrelevant since it is clear that she spoke on the employees' behalf as well as her own. *Diagnostic Center Hospital,* 228 NLRB 1215, 1217, see also *K-Mart Enterprises, Inc.,* 202 NLRB 358.

A violation of the Act is found when the General Counsel establishes, by a preponderence of the evidence, that Respondent's conduct was, in part, discriminatorily motivated and the possible coexistence of separate lawful reasons does not eliminate the unlawful aspects of the conduct in question. Further, the legal effect of such "mixed motive" cases is the same as though the illegal reason was the operative factor. See *Rabco Metal Products, Inc.* 221 NLRB 1230. In the instant case, Respondent by its own admission based Surley's discharge at least in part on her protected concerted activities in protesting and objecting to Respondent's policies regarding the recall procedure and the forced use of earning vacation. Accordingly, I find that Respondent violated Section 8(a)(1) when it discharged Surley on April 18.

Even if two of Respondent's key officials had not made the damaging admissions as to Respondent's motivation as described above, I am convinced that the record evidence establishes beyond question that Respondent seized upon both Surley's remark to Davis and as well as her alleged failure to commence work

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grounds for its action in discharging Surley is totally devoid of any factual basis since Respondent had, by April 17, already changed its announced policy and implemented a policy consistent with Surley's desires. In presenting this argument, Respondent chooses to ignore Barkley's clear statement that he considered her complaints in this regard as evidencing a "negative attitude."

promptly at 8 a.m. as a pretext to mask its true motivation, i.e., to rid itself of an employee who had demonstrated a growing propensity to engage in protected concerted activities. In this regard, I note first, Surley's remark to Davis as reported to Barkley was relatively innocuous, caused no disruption in the work area and was completely consistent with Respondent's well established policies that employees were expected to strictly adhere to Respondent's work hours and were to commence work promptly at 8 a.m. and leave their desks promptly at 4:30 p.m.

Second, with respect to Surley's alleged failure to start work at the appointed hour and her spending up to 20 minutes walking around the room talking and disturbing other employees, Barkley, though he admittedly observed this conduct for several minutes, made no attempt whatsoever to correct her "insubordinate" behavior.

Thirdly, Barkley made no real effort to fully investigate the incidents of the morning of April 18 but instead immediately sought authorization to discharge an employee with 9½ years seniority. No opportunity was offered to Surley to explain her actions or conduct.

Fourth, Respondent deviated from its normal established custom and habit as to the method used in reaching a decision on discharging an employee. Yant, Surley's direct and immediate supervisor, credibly testified that prior to Surley's discharge, he had always been at least informed of the decision sometime prior to its implementation. Here, Yant had no impute into the decision and was merely informed of it only 5 minutes before it was announced to Surley

Fifth, and perhaps most significantly, the record establishes significant evidence of disparate treatment in

the instant matter that raises a strong inference that Respondent was basing its decision on unlawful considerations. In November, employee Cox received a 1-day suspension for conduct which Barkley described as "a deliberate attempt to discredit management and disturb a work area." Barkley further described that incident as "an extremely noisy happening." Even viewing the evidence in the lightmost favorable to Respondent, Surley's conduct on the morning of April 18 was neither a "extremely noisy happening" nor a *deliberate* attempt to discredit management and disturb the work area.[20] Despite the fact that Respondent had merely suspended employees in the past for acts of misconduct, the subject of discipline less severe than discharge was never even discussed here.

Accordingly, even absent any admissions, I would find, based on the entire record, that Respondent's ascribed reasons for the discharge of Surley are pretextual and its conduct violative of Section 8(a)(1).

Finally, I deal with the General Counsel's contention that Respondent, in violation of Section 8(a)(3), also terminated Surley because "she had dared to discuss the possibility of organizing the office personnel at a time when Respondent was being struck by the Teamsters." The General Counsel has not, in my opinion, met its burden in this regard.

Surley's activities were limited to discussing at some time between April 9 and April 17 the possibility of a union with some of her laid off co-workers and her one brief joking discussion with her immediate supervisor,

[20] If, as Respondent contends, Surley's conduct between 8 a.m. and 8:20 a.m. that morning was loud and disruptive, Barkley's explanation as to why he allowed it to continue was lame at best. Additionally, I note that Yant, whose office also faces the clerical work area and who was in his office that morning, did not notice any disruption or loud talking.

Yant, on the afternoon of April 18. The General Counsel, while conceding that there is no record of evidence that higher management knew of this activity, contends that the precipitous nature of her discharge, as well as Respondent's deviation from its past established disciplinary practices lead one to the inescapable conclusion that Surley was terminated because of her support of the Union. I disagree. The evidence clearly demonstrates that the decision to discharge Surley was made early in the morning of the 18th prior to Barkley's and Tittle's acquisition of the knowledge that Surley had been making joking remarks in support of the Union. Accordingly, I shall recommend dismissal of the 8(a)(3) portion of the complaint.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in sections II and III above occurring in connection with the operations of Respondent described in section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Linda Surley in violation of Section 8(a)(1), I recommend that Respondent be ordered to offer her reinstatement and to

make her whole for any loss of pay resulting from her discharge by a payment of a sum of money equal to the amount she would have earned as wages from the date of her discharge to the date on which reinstatement is offered less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon to the computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by discharging employee Linda Surley.

3. Respondent did not violate Section 8(a)(3) of the Act by discharging employee Linda Surley.

Upon the foregoing findings of fact, conclusions of law and upon the entire record pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

Respondent, Red Ball Motor Freight, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging employees for engaging in protected concerted activities.

[21] In the event no exceptions are filed as provided by Section 102.46 of the rules and Regulations of the National labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Linda Surley immediate and full reinstatement to her former job or if that job no longer exists, to substantially equivalent position without prejudice to her seniority or other rights and privileges and make her whole for her loss of earnings in the manner set forth in the section of the Decision entitled "The Remedy."

(b) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due.

(c) Post at its Dallas, Texas, facility the attached notice marked "Appendix."[22] Copies of the notice on forms provided by the Regional Director for Region 16 after being duly signed by Respondent's authorized representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

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[22] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 16, in writing, within 20 days of the date of this Order what steps Respondent has taken to comply herewith.

Dated: February 20, 1980.

LEONARD N. COHEN
Administrative Law Judge

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United States Court of Appeals
For the First Circuit

NO. 80-1721

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

WRIGHT LINE,
A DISIVION OF WRIGHT LINE, INC.,

RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

CAMPBELL, BOWNES and BREYER,
Circuit Judges.

Joseph A. Schwachter, Attorney, with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Howard E. Perlstein*, Attorney, were on brief, for petitioner.

William H. DuRoss, III, with whom *Gerard C. Smetana*, *Kovar & Smetana*, and *Julius Kirle*, were on brief, for respondent.

September 21, 1981

CAMPBELL, *Circuit Judge*. Bernard Lamoureux, an activist in the Teamsters' two unsuccessful campaigns to organize Wright Line's employees, was discharged from his job as a shop inspector, ostensibly because he submitted an inaccurate record of the times at which he performed inspections on December 29, 1977. Upon Lamoureux's complaint, the Board found that Wright Line had discharged him because of his union activity, in violation of section 8(a)(3) of the National

Labor Relations Act. The Board ordered Wright Line to reinstate Lamoureux with back pay. We enforce the Board's order.

I.

Wright Line manufactures computer storage products to the specifications of customers, including government agencies. Lamoureux began working for Wright Line in 1966 and, with the exception of a period between 1971 and 1973, was employed there continuously until his discharge on December 30, 1977. The Board found, with substantial record support, that Lamoureux's work, throughout this period until December 29, 1977 was satisfactory or better. For the last two years of his employment, he worked in the company's Inspection Department, inspecting completed parts for quality and conformity to specifications. This position required that he keep records on two forms: the Inspection Report, which stayed with the blueprint for the inspected part, and the Daily Activity Sheet, on which he recorded the time of each inspection and which he submitted to his supervisor after each day's work.

In 1976, Lamoureux contacted Teamsters Local 170 and initiated an organizational drive among Wright Line's employees. The Board supportably found that Lamoureux was visibly active in the union campaign. An election was held on August 27, 1976, and Lamoureux served as an alternative observer for the union, which lost the election. A second campaign was conducted in the fall of 1977, and Lamoureux was again active. An election was held on October 20, 1977; the union lost again. The Board supportably found that Wright Line management conducted an aggressive (although not necessarily unlawful) campaign against the union, and that management was well aware of Lamoureux's activism, certain supervisors having made "gratuitous remarks" to him about it.

The Board found, on the basis of substantial evidence, that Lamoureux's discharge occurred as follows: on the morning of December 29, 1977, Plant Superintendent Southard asked Supervisor Forte to check on Lamoureux, reporting that he had seen Lamoureux entering the men's room carrying a newspaper. Forte went to Lamoureux's two assigned departments and walked between them until Lamoureux appeared some 35 minutes later. Forte then returned to his office, saying nothing to Lamoureux, and noted the times of Lamoureux's absence. Forte had made no attempt to locate Lamoureux, neither looking in the men's room nor using the plant's page system, although Lamoureux's job included several tasks which would require him to leave his departments for short periods. Later the same day, Forte had occasion to be in Lamoureux's department and did not find him there. About 30 minutes later he found Lamoureux at a workbench inspecting a part. Forte again made a record of the incident but did not ask Lamoureux to explain.

The next morning, Forte checked Lamoureux's Daily Activity Sheet and noted Lamoureux's report that he had made several inspections during the time when Forte had failed to find him in his departments. Forte presented this information to his own supervisor, who stated that this indicated a "dischargeable offense." The two consulted higher officials, who told them that they "could discharge" Lamoureux if his account substantiated the charge. Forte prepared a written report of the incident, had Lamoureux's final paycheck prepared, and then summoned Lamoureux to a meeting with himself and two others. Confronted with the charge, Lamoureux admitted that "the times weren't accurate and they never were," stating that "if you want them right to the second, I can put them right to the second," and asserting that the real reason for the confrontation was his union activity.

The supervisors denied this charge and discharged Lamoureux, saying that they no longer considered him trustworthy.[1]

II.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), provides that,

> (a) It shall be an unfair labor practice for an employer
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

This provision is supplemented by section 10(c) of the Act, 29 U.S.C. §160(c), which authorizes the Board to take remedial action, with the following limitation:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Section 8(a)(3) imposes a prohibition on employers which is simple to state but often difficult to apply in practice: they may not discharge an employee because of his union activity; but they may and should apply their usual rules and disciplinary standards to a union activist just as they would to any other employee. Hence, in a given discharge case it must be decided whether the employer acted because of the employee's union affiliation, or whether he acted because of some factor unrelated to the employee's union status. *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 675 (1961) (test is "true purpose" or "real motive").

Often, of course, there are competing explanations of why an employee was fired. Board counsel will point to evidence

[1] The Wright Line managers did not then and do not now contend that Lamoureux did not actually perform any of the inspections he reported. Their complaint was and is only that he "falsified" his report of the timing of his inspections.

of anti-union motivation. The employer will cite some instance of misconduct, and will deny having been motivated by any other consideration. In such a situation, the Board needs to determine not only whether the asserted misconduct occurred, but whether, even so, it effectively produced the discharge. The employer will doubtless lose if the asserted misconduct is shown not to have occurred. But suppose it occurred? In such event, Board counsel will argue that it was insufficient cause for discharge — that a non-activist would have been retained notwithstanding the offense. The employer, on the other hand, will deny this, and will insist, moreover, on his right, as the employer, to determine what conduct is or is not acceptable.

The Board's approach to these cases — sometimes, although without complete accuracy, termed "mixed motive" cases — has been the source of a continuing controversy among the circuits and between the Board and this court. In the present case, the Board has taken a new approach. Relying on *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and precedent from this circuit, the Board announced the following rule: general counsel must first "make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a 'motivating factor' in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21. Applying that test here, the Board found that the prima facie case had been made and that Wright Line failed to prove that it would have taken the same action regardless of Lamoureux's union activity. Wright Line challenges the Board's new approach and its application here as contrary to the provisions of the statute and beyond the powers of the Board in that it places the burden of persuasion on the employer. We are thus called upon to pass on the val-

idity of the Board's new rule as well as on its application to this record.[8]

We start by observing that the Board's new rule seems better than its old one. Previously the Board would find a violation of section 8(a)(3) and order reinstatement whenever it concluded that the discharge was even partially motivated by opposition to union membership. Under this approach, a discharge was improper even if it would have occurred absent the illegal motivation, *e.g.*, the employee may have committed an infraction so serious that any employee — union or non-union — would have been fired. This partial motivation test — as the Board now acknowledges — placed "the union activist in an almost impregnable position once [anti-]union animus has been established." Activists could not be discharged for conduct that would be unforgivable in the case of another employee. The result was to immunize union activists against legitimate discipline for genuine offenses, and to deprive employers of the freedom to apply their own rules uniformly to all their employees. *See NLRB* v. *Wilson Freight Co.*, 604 F.2d 712 (1st Cir. 1979); *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979); *Liberty Mutual Insurance Co.* v. *NLRB*, 592 F.2d 595 (1st Cir. 1979); *Hubbard Regional Hospital* v. *NLRB*, 579 F.2d 1251 (1st Cir. 1978); *NLRB* v. *Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978); *Stone & Webster Engineering Co.* v. *NLRB*, 536 F.2d 461 (1st Cir. 1976); *NLRB* v. *Fibers International Corp.*, 439 F.2d 1311 (1st Cir. 1971); *NLRB* v. *Billen Shoe Co.*, 397 F.2d 801 (1st Cir. 1968); *NLRB* v. *Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963).

In response to the Board's handling of these cases, we have repeatedly urged the Board to go beyond the employer's ob-

[8] Our review of the Board's factual findings is limited to determining whether they are supported by substantial evidence. 29 U.S.C. §160(e). But the Board's adoption of the *Mt. Healthy* test, to the extent that it establishes a new standard or set of legal presumptions, is a ruling of law which we review for legal error, giving due deference to the Board's expertise in interpreting the act it administers.

vious wish to be rid of an activist and to inquire into the question of actual cause, giving serious consideration to the employer's legitimate business reasons for discharging the employee. *See, e.g., NLRB* v. *Lowell Sun*, 320 F.2d at 841 (Aldrich, J., concurring) (employer's knowledge that discharge will have pleasing result not to be confused with actuating motive). We have expressed this concern by insisting that the Board find the protected activity to be the "dominant motive" for the discharge. *See, e.g., NLRB* v. *Fibers International*, 439 F.2d 1311; *NLRB* v. *Lowell Sun*, 320 F.2d 835 (Aldrich, J., concurring); *NLRB* v. *Whitten Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953) (reinstatement warranted if protected activity "weighed more heavily" than other factors); and cases cited in these opinions. Elaborating on the meaning of this test, we have held that the Board may order reinstatement only after finding that the discharge would not have occurred in the absence of the protected activity. *NLRB* v. *Fibers International*, 439 F.2d at 1312 n .1 & 1315.

The Supreme Court's decision in *Mt. Healthy* v. *Doyle*, 429 U.S. 274, followed by *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), seemed to us to lend strong support to our analysis in the *Fibers International* case. In cases since *Mt. Healthy*, we have relied on its expression of the "but for" standard, abandoning our earlier "dominant motive" language. *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902 (1st Cir. 1981); *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979); *Colletti's Furniture, Inc.* v. *NLRB*, 550 F.2d 1292 (1st Cir. 1977). We came to recognize that the existence or not of a causal link between union activity and the employee's injury — or, as section 8(a)(3) puts it, the existence of anti-union "discrimination in regard to hire or tenure of emploment" — was most accurately determined by asking whether the discharge would have occurred "but for" the protected activity, it is clear no unfair practice existed since a bad motive without effect is no more

an unfair labor practice than an unexecuted evil intent is a crime. While *Mt. Healthy* involved employee activity protected by the Constitution rather than by the NLRA, it presented issues of causation, harm and remedy very similar to those raised in the labor context, and the Court expressed the same concerns that we have voiced in labor cases.[3] The lower court in *Mt. Healthy*, like the Board in past labor cases, had ordered reinstatement on a finding that the protected activity was one of two reasons for the decision to discharge the employee. The Court's dissatisfaction with this result was exactly what ours had been: that the employee who engaged in protected conduct would thereby be placed in a better position than he would have held if he had not done so, and his employer's freedom to apply legitimate performance standards would be impaired by the activist's favored position. *Id.*, at 285-87. To avoid these results while protecting the employee's rights, the Court ruled that reinstatement should be ordered only upon a finding that the employee would not have been discharged but for the protected conduct. In labor cases, as in constitutional cases, we think the "but for" test is the correct substantive standard for evaluating the propriety of a resinstatement order.[4]

Wright Line does not appear to quarrel with this substantive test. Its challenge is to the Board's apparent adoption of *Mt. Healthy*'s allocation of the burdens of proof. *Mt. Healthy* held that once the plaintiff had shown his protected activity to have been a "substantial" or "motivating" factor, "the court should have gone on to determine whether the Board [of Edu-

[3] For discussion of the analogy between *Mt. Healthy* and section 8(a)(3) cases, see Michael S. Wolly, "What Hath *Mt. Healthy* Wrought," 41 Ohio State L.J. 385-99 (1980); and William H. DuRoss, "Toward Rationality in Discriminatory Discharge Cases: The Impact of *Mt. Healthy Board of Education* v. *Doyle* Upon the NLRA," 66 Georgetown L.J. 1109 (1978).

[4] We have applied the same subtantive test to evaluate a claim for reinstatement by an employee allegedly discharged in violation of the Age Discrimination in Employment Act. *Loeb* v. *Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979).

cation] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287. *See also Givhan* v. *Western Line*, 439 U.S. at 416. Wright Line contends, citing section 10(c) of the National Labor Relations Act,[5] the Board's regulation 101.10(b),[6] and section 7(c) of the Administrative Procedure Act,[7] that the Board lacks authority to place any burden of proof on the employer. Wright Line argues that these provisions require the board to prove the employer's guilt by a preponderance of the evidence, and that the Board's burden-shifting approach instead requires the employer to prove his innocence.

We have no difficulty accepting the Board's formulation that *some* kind of a "burden" devolves upon the employer once the general counsel has made a prima facie showing that protected conduct was a motivating or substantial factor in the discharge decision. 251 NLRB No. 150, at 20-21. Indeed, in *Statler Industries* v. *NLRB*, this court approved the general causation analysis expressed in the Board's *Wright Line* opinion. 644 F.2d at 905. On further reflection, however, we disagree with the Board on the narrow issue of defining the exact nature of the burden which the employer thus acquires. Section 10(c). as well as the Board's own regulation, make clear that the general counsel must prove the employer's guilt by a preponderance of the evidence to warrant a finding that

[5] Section 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

[6] 29 C.F.R. §101.10(b) provides in part:

> The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act.

[7] Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556, provides in part that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

an unfair labor practice has occurred.[8] We think the only burden which may be acceptably placed on the employer is a "burden of production," that is a burden of coming forward with credible evidence to rebut or meet the general counsel's prima facie case. This, in effect, is the position we took recently in other cases although without actually characterizing

[8] The Board relies on *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967), in which the Court held that "once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *Id.*, at 34. *Great Dane*, which involved a challenge to an overall policy of the employer rather than to a single discharge, is inapposite here. Where an overall policy concededly does discriminate against protected activity, the Board must balance the employer's justification against the employee's interest, and it may fairly require the employer to demonstrate the genuineness and strength of its asserted business reason. But here the issue is whether the discharge was in fact discriminatory — whether it was caused by protected activity or whether some other factor was operative. *Great Dane* has no application. *See* L. Janofsky, "New Concepts in Interference and Discrimination under the NLRA," 70 Colum. L. Rev. 81, 96 (1970).

The Board also invokes the portion of section 10(c) quoted at the beginning of this section, regarding discharges for cause, citing Congress' rejection, in drafting this provision, of proposed language barring reinstatement unless the "weight of the evidence shows that such individual was not suspended or discharged for cause." H.R. 3020, 80th Cong., 1st Sess., §10 (1947). Quoting passages from debate on this provision, the Board argues that Congress intended to keep the burden of showing cause where Congress understood that it had been — on the employer. 93 Cong. Rec. 6677-78 (remarks of Senator Taft); 93 Cong. Rec. 7683 (remarks of Senator Ball). Wright Line argues, citing other passages of debate and quoting the Conference Report on the bill, that Congress did indeed intend to keep the burden where it was — on the Board. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947); 93 Cong. Rec. 6677-78 (colloquy between Senators Taft and Pepper). We find the legislative history as well as the statutory language inconclusive on the question of burden of proof. This provision of section 10(c) served to reaffirm the substantive standard that was already implicit in section 8(a)(3) and that we have repeatedly urged on the Board: reinstatement is not warranted if the discharge was actually the result of "cause" rather than of unlawful discrimination, even though "cause" might coincide with union activity to which the employer is hostile. *See NLRB* v. *Eastern Massachusetts Street*

the employer's burden as one of "production" rather than "persuasion." *NLRB* v. *Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981); *NLRB* v. *Cable Vision*, No. 80-1611, slip op. (1st Cir. Sept. 18, 1981). We said in those cases that once the general counsel has established a basis for finding an improper motive, the employer must merely, "come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB* v. *Amber Delivery Service*, 651 F.2d at 69; *NLRB* v. *Cable Vision*, slip op. at 13.

Professor Wigmore distinguishes between the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ultimate issue in a case by a preponderance of the evidence as follows:

> "[A] 'prima facie' case . . . need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof . . . ."

9 Wigmore on Evidence §2487, at 282 (3d ed. 1940), *quoting Speas* v. *Merchant's Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924).

Put another way, the general counsel's initial, prima facie showing creates a kind of presumption that an unfair labor practice has been committed. At this point, the employer risks losing his case unless he rebuts the presumption with evidence of his own. The Board may properly recognize this by stating that the employer (who alone has access both to the reason he

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Ry. Co., 235 F.2d 700, 709 (1st Cir. 1956) ("The purpose of this provision is to make it abundantly clear that the Board is not to interfere with the exercise by employees of their traditional right to discharge employees for adequate cause."). The question of burden of proof is addressed only in the "preponderance" language of the preceding sentence of section 10(c); that provision requires the general counsel to prove the violation by a preponderance of the evidence.

discharged the employee and any corroborative evidence) now comes under a "burden" to produce evidence of a "good" reason for the discharge. The imposition of this limited burden, however, does not shift to the employer the burden of proving that an unfair labor practice has not occurred. Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as "the burden of going forward with evidence to rebut or meet the presumption," and distinguishes this duty from "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301. Thus, the employer in a section 8(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.

The Board may properly provide, therefore, that "Once [a prima facie showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21 (footnote omitted). The "burden" referred to, however, is a burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation.[9]

We recognize that the Supreme Court's language in *Mt. Healthy* appeared to place an affirmative burden of persuasion on the employer. We further recognize that this court's acceptance of *Mt. Healthy* in some previous cases may have sug-

[9] The Board appears to recognize that the general counsel must always establish the existence of an unfair labor practice by a preponderance of the evidence, but then confuses the issue by mislabeling the employer's burden as an "affirmative defense." 251 NLRB No. 150, at 18 n.11. The employer's duty, however, is merely a burden of producing rebuttal evidence and thus in no way resembles a true affirmative defense. Moreover, the Board's reference to its own "prima facie case" may suggest that the general counsel should prevail upon a showing of something less than a preponderance of evidence that the counsel's version of disputed facts is the true one. Let there be no mistake here either. The burden of persuasion on all issues of disputed fact rests at all times with the general counsel.

gested that we, too, saw the burden upon the employer as, in all situations, a burden of persuasion.[10] A closer look at *Mt. Healthy*, however, indicates a critical difference between that case and most labor cases. This difference does not affect the substantive utility of the "but for" analysis there employed, but does affect the nature of the employer's burden.

In *Mt. Healthy*, the employer conceded that he had fired the employee for speech activity which was later found to be fully protected under the first amendment. Thus, the "but for" test was not used, as it is in the typical labor case, as a part of the process of deciding whether a violation of protected rights had occurred. Rather, the "but for" test applied only *after* such a violation had been proven by the employer's own admission. The employer's claim, then, was a true affirmative defense to a rehiring order — *i.e.*, the employer contended that notwithstanding his violation of the Constitution reinstatement was improper as a remedy because the employee had also been involved in an altercation with another teacher, an argument with cafeteria employees, and an incident in which he made obscene gestures to female students. The employer argued that these incidents, which were totally independent of the protected speech activity, justified the employee's dismissal *notwithstanding* the fact that the employer had violated the employee's constitutional rights.[11] The employer's claim was

[10] *Statler Industries*, 644 F.2d 902 (1st Cir. 1981), for example, suggested that an employer in a section 8(a)(3) discharge case bears the burden of persuasion in proving that there would have been no discharge but for an employee's protected activity. *Id.*, at 905 n.4. On this narrow issue regarding the burden of proof, we disaffirm our previous ruling and adopt the analysis set forth in this opinion. Also, to the extent that *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979), can be read to impose a burden of proof on the employer, it, too, is hereby overruled. Nevertheless, we do hold that the Board is justified, after a prima facie showing by the general counsel, in requiring the employer to produce evidence showing "that it had a good reason, sufficient in itself, to produce the discharge." *Id.*, at 671.

[11] A similar claim might, on rare occasions, be raised in some labor cases. For example, where an employer fires a person for union activity, in clear violation of section 8(a)(3), but a few days later discovers the employee had,

thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance.

By contrast, in the typical labor case (and in the present case), the employer vigorously disputes the determining reason for the discharge. These cases therefore do not involve true affirmative defenses going to the appropriateness of the remedy, nor would the "but for" analysis be employed to determine the existence of such an affirmative defense. Rather, the "but for" test is in such cases a convenient formula for deciding whether or not an unfair labor practice has actually occurred — *i.e.*, for deciding if the determining motive of the discharge was anti-union animus or some valid business reason. The "but for" standard requires a determination by the Board, based on all the evidence, that, wholly apart from an alleged illegal motive, the employer would (or would not) have discharged the employee for the conduct ascribed to him by the employer. If the discharge would have taken place irrespective of the anti-union motive, no unfair labor practice took place, if the discharge would not have taken place, it is clear that the determining reason for the discharge was the protected activity, not

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unknown to anyone, been embezzling money, the employer may be justifiably required to prove, by a preponderance of the evidence, that a reinstatement order for his unfair labor practice is inappropriate. The employer there is not defending on the ground that the discharge was properly motivated, but rather on the theory that, notwithstanding the commission of an unfair labor practice, he should not have to take the particular person back. *Cf. NLRB v. Savin Business Machines Corp.*, No. 80-1645, slip op. at 7 (1st Cir. May 29, 1981) (employee's participation in robbery after unlawfully motivated discharge would have great bearing on right to reinstatement). It should be emphasized, however, that this is the rare case. Typically, employers and the general counsel point to the same or to related evidence and ascribe different inferences of motivation. In this more normal situation, the general counsel must prove, by a preponderance of the evidence, that the employer had an illegal motivation *and* that the employer would not have fired the employee anyway for a valid business reason.

the reason given by the employer.[12] With respect to this ultimate question of a determining causal link between the bad motive and the discharge, the burden of persuasion remains always with the general counsel. In the course of its inquiry, however, the Board and the ALJ are entitled to place a burden of production on the employer in the manner already described once a sufficient prima facie showing of illegal motive is made by the general counsel. *Cf. Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214 (March 14, 1981) (stating that burden of persuasion on the issue of discriminatory intent in Title VII cases remains always with the plaintiff).

It may be said by way of concluding our discussion on this point, that labels concerning burdens of "persuasion" and "production" are not, as a practical matter, likely to be very important in most of these cases. Decision will usually turn on a weighing of all the evidence. But this weighing, under the Board's new formulation, will include a careful consideration of the employer's "good" reason as well as of the general counsel's evidence of improper motive. This approach will assure that due condiseration is given to all facets of the case.

III.

Applying these principles to Wright Line's discharge of Bernard Lamoureux, we find substantial evidence to support a conclusion by the Board, on the preponderance of the evidence, that Lamoureux was discharged because of his

[12] Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with anti-union animus discharges an employee he would not have fired "but for" the employee's union activity. We think that even employers who do not particularly like unions nevertheless comply with the law so long as they treat all their employees — union and non-union — alike.

union activity.[13] We therefore affirm the Board's finding that Wright Line violated the Act in discharging Lamoureux, and that Lamoureux is entitled to reinstatement with back pay.

As background to the discharge, the general counsel presented evidence that Lamoureux was a leading union advocate and that Wright Line management was aware of Lamoureux's role. The evidence showed that management was aggressive in its opposition to the union and that management's hostility was on occasion directed at Lamoureux in particular.[14] The general counsel also presented evidence of the

[13] Although the Board arrived at their conclusion by the use of a standard with which, in some respects, we disagree, we see no reason to remand this case for new findings. The ALJ in this case conclusively found that the company's alleged legitimate reason for discharging Lamoureux "has no validity at all" and "was false." There is substantial evidence to support these findings. Moreover, the company here, unlike the school boards in *Mt. Healthy* and *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), did not allege a series of wholly distinct events, some of which were unrelated to protected activity and which might "admit of the argument" that the employer would have discharged Lamoureux despite his union activity. *Id.*, at 417 n.5. Thus, no remand is necessary in this case.

[14] There was testimony that the company distributed reproductions of newspaper articles derogatory to the Teamsters Union, including one article relating the murder indictment of an official of another Teamsters local. There was also evidence of a letter to employees in which the company president stated that Wright Line's "chances for survival and growth would be seriously hurt by the presence of a union," and evidence of three incidents during the 1977 campaign involving Lamoureux. On one such occasion, Supervisor Forte called Lamoureux to his office and charged him with "pressuring someone to vote union"; Forte later retracted the statement. On another occasion, Forte saw Lamoureux counting his pay and asked "What's that? Union campaign funds?" In a third incident, a foreman told Lamoureux that "Everybody knows you're the union kingpin." Wright Line contends that the Board's reliance on these incidents is improper, since the Board has not alleged that any of them involved an unfair labor practice by the company, and since some may involve expression protected by the first amendment. We have held, however, that anti-union statements "plainly within [management's] rights . . . do lend a significance to otherwise ambiguous events when the question is whether a given course of conduct was actuated by anti-union animus." *NLRB* v. *Lowell Sun*, 320 F.2d at 840. The incidents cited, whether lawful of not, do not prove that Lamoureux was discharged because of his union activity. But they do show that the company knew of his activity and was displeased by it; they thus provide a relevant background for analyzing the circumstances of the discharge.

circumstances surrounding the discharge itself. These circumstances, taken together and in the light of this background, support the Board's inference that the company was watching Lamoureux for any transgression that might provide an opportunity for discharge, and that it seized on Lamoureux's otherwise trivial offense to effectuate its true purpose of getting rid of an activist.

The evidence showed that Southard asked Forte to check on Lamoureux, who was entering the men's room with a newspaper, even though this conduct violated no company rule and even though Lamoureux had no history of laxity to warrant suspicion. Forte's "checking" consisted of measuring and documenting Lamoureux's absence; it did not include looking in the men's room or paging Lamoureux, even though Lamoureux's job was such that he might have been absent for a legitimate purpose. When Forte found Lamoureux after another absence later in the day, he did not ask for an explanation, although he apparently considered the absence significant enough to merit recording. From these facts, the Board could reasonably infer that Southard and Forte were primarily interested in building a case against Lamoureux rather than simply assuring that he attend properly to his work.

The events following Forte's review of Lamoureux's time report also support the inference of impropriety. Rather than confronting Lamoureux directly, as might be expected of a supervisor who discovers an apparent transgression by an otherwise satisfactory long-term employee, Forte immediately consulted higher officials. These managers' first response was that the offense was "dischargeable"; they made the decision to discharge Lamoureux even before discussing the matter with him. By the time Lamoureux was called in, Forte had prepared his final paycheck and drafted a memorandum for the file. When Lamoureux finally received a chance to explain, his defense apparently fell on deaf ears. He conveyed no inability or unwillingness to make accurate time reports;

rather his response suggested that he had not done so because he had not considered it important, and that he would do so if desired. Nevertheless, he was not warned or reprimanded, but discharged. From this and other evidence, mentioned hereinafter, the Board could reasonably infer that the inaccurate time report was seized upon to justify action taken for another reason.

This inference might have been overcome had there been evidence establishing that Wright Line would have fired employees in Lamoureux's position (whether or not union activists) for this sort of infraction. For example, it might have been proven that Wright Line was a consistently strict employer who commonly fired employees for rule violations no more serious than this, or else that this was in fact a violation very detrimental to its business which warranted discharge. Had this been done—had it been established that apart from union activity, Lamoureux would have been discharged for making such a time report—a finding for the employer would have been indicated. But no such conclusion was required on this record. Wright Line relies on its rule against "knowingly altering or falsifying production time reports."[13] It emphasizes its use of Daily Activity Reports to verify performance of inspections, to evaluate individual inspectors, and to monitor staffing levels. But the Board concluded, with ample support in the record, that the time of each inspection, as opposed to the fact that each was done and the number done in a day, had no bearing on any of these calculations and received no notice from management.

[13] The rule, which also prohibits falsifying "payroll records, or punching another employee's timecard without supervisory approval," provides that a first infraction "may" be punished by discharge or by any lesser disciplinary infraction, such as suspension or a warning. Of course, where an employer enforces a valid rule in an even-handed manner, there is usually no violation of the Act. *See Texas Instruments v. NLRB*, 637 F.2d 822 (1st Cir. 1981) (finding that employee violation of valid rule prohibiting disclosure of confidential information justified discharge because such activity is not protected by section 7).

Lamoureux testified, and the Board was entitled to believe, that he had never been instructed to record times exactly, that he had never heard of any employee being criticized for inaccurate reporting of times, and that the general practice among inspectors was to record times in "round figures." The Board could conclude from the evidence that Lamoureux's offense affected no significant interest of his employer, and no interest that Wright Line had treated as significant.[10]

Wright Line asserts that Lamoureux's "falsehood" proved him untrustworthy, and therefore unworthy of the reliance it must place on its inspectors. Clearly a showing of dishonesty would cause most employers to discharge an employee. The Board could reasonably doubt, however, that an employer would lose its trust in such a long term, satisfactory employee on the basis of an inaccuracy that cost the employer nothing and gained the employee nothing. Lamoureux's time report, under these circumstances, suggests no intention to falsify; at worst it demonstrates carelessness on a matter of little significance.

Further, the evidence showed that Wright Line's past practice in handling similar offenses had been quite different. The Administrative Law Judge found, based on testimony regarding the time required to perform inspections, that reports submitted by other inspectors contained "easily discernible" inaccuracies; yet no other inspector was ever disciplined in any way for inaccurate time reports. There was also evidence of an incident in which Wright Line's Chief Inspector had another employee punch her time card, a violation of the same rule. *See* note 15, *supra*. Even though such conduct strongly

[10] It is, of course, the employer's judgment of the importance of time records, and not the Board's judgment or our own, that matters. An employer is entitled to make and enforce his own rules, however foolish they may appear to the Board, as long as he does not base personnel decisions on union status. *See, e.g., Liberty Mutual Insurance Co.* v. *NLRB*, 592 F.2d at 603. Nevertheless, where the issue is what motivated a decision to discharge, the apparent insignificance of a particular rule, along with the employer's history of treating it as unimportant, support an inference that something more was involved than just a breach of that rule.

suggests deliberate falsification to cover an unexcused absence at the employer's expense, the Chief Inspector received only a warning; she was not discharged. There was evidence that Wright Line had discharged two employees for dishonesty, but both instances involved conduct amounting to outright theft from the company. One of these employees, an accountant, had embezzled funds, while the other, a salesman, had falsified his reports so as to collect unearned commissions. On this evidence, the Board was warranted in perceiving a difference between Wright Line's responses to Lamoureux's offense and its handling of comparable incidents of misconduct. The Board could reasonably infer from this that some other factor was involved in Lamoureux's case; and the background of Lamoureux's activism and the company's animus could be thought to supply the missing factor.

Further support for the Board's conclusion as to Wright Line's motivation comes from the ALJ's credibility judgments. To rebut the inference of improper motive, Wright Line presented the testimony of three of the officials involved in the discharge. Each related his own view of the incident, denying any concern for Lamoureux's "untrustworthiness," as shown by his false time report. The ALJ stated that, from the demeanor of the witnesses as well as from "the record as a whole," I do not believe that they were truthful in revealing the 'real reason' for Lamoureux's discharge." The ALJ's evaluation of Forte's testimony is particularly specific. He found that Forte appeared generally honest, until questioned about Lamoureux's discharge. "Here, being a generally truthful man, he showed physical signs of disassembling." The ALJ's credibility judgments must stand unless they are unreasonable, which these are not. Under these circumstances, the witnesses' untruthfulness strengthens the inference of unlawful motive. *Shattuck Denn Mining Corp.* v. *NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

On this record, the Board was justified in finding that the general counsel had proven, by a preponderance of the evidence, that Wright Line discharged Lamoureux because of his union activity, in violation of section 8(a)(3) of the Act.

The petition for enforcement is granted.

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WRIGHT LINE, A DIVISION OF
WRIGHT LINE, INC.

and

BERNARD R. LAMOUREUX.

Case 1-CA-14004

August 27, 1980

DECISION AND ORDER

On October 27, 1978, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and conclusions of

1. Respondent contends that the Administrative Law Judge's credibility resolutions, findings of fact, and conclusions of law stem from bias or hostility. We find no merit in this contention. There is no basis for finding that bias or partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N. L. R. B. v. Pittsburgh Steamship Company*, 337 U. S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Respondent excepted, *inter alia*, to the Administrative Law Judge's conclusion that it violated Section 8(a)(3) and (1) of the Act when, on December 30, 1977, it discharged Bernard Lamoureux. We agree with the result reached by the Administrative Law Judge, but only for the reasons that follow.

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, *inter alia*, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. As discussed *infra*, various "tests" have been employed by the Board and the courts to aid in making such determinations. These tests all examine the concept of "causality," that is, the relationship between the employees' protected activities and actions on the part of their employer which detrimentally affect their employment.

The Administrative Law Judge's Decision in the instant case reveals some uncertainty regarding the appropriate mode of analysis for examining causality in cases alleging unlawful discrimination. Indeed, similar doubts

2. Respondent has excepted to the Administrative Law Judge's recommended broad cease-and-desist order. In our recent decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as the instant violations do not meet this test, we shall modify the Administrative Law Judge's Order to require Respondent to refrain from violating the Act in any like or related manner.

as to the applicable test appear to have become widespread at various levels of the decisional process primarily as a result of conflict in this area among the courts of appeals and between certain courts of appeals and the Board.

After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act. We shall examine causality in such cases through an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977).

It is our belief that application of the *Mt. Healthy* test [3] will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination. We further find the *Mt. Healthy* test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions. Finally, in this regard, enunciation of the *Mt. Healthy* test will alleviate the confusion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interest in this area, thereby advancing the fundamental objectives of the Act.

I. The Distinction Between Pretext and Dual Motive

It is helpful, initially, to distinguish between what are termed "pretext" cases and "dual motive" cases because it is in the dual motive situation where the legitimate inter-

3. For ease of reference, we shall refer to this test of causality as the *Mt. Healthy test*. We note, however, that *Mt. Healthy* itself does not constitute a construction of the National Labor Relations Act and, accordingly, our Decision here is not compelled by *Mt. Healthy*. We do not view *Mt. Healthy* as at odds with our previous construction of the Act.

ests of the parties most plainly conflict. Consequently it is in such situations that the existing controversy and confusion in this area are highlighted.[4]

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation.[5]

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4. As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases.

5. Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence. The concep-

II. The "In Part" Test

For a number of years now, when determining whether the Act has been violated in a dual motivation case, the Board has applied what is termed the "in part" causation test. In its present form the "in part" test provides that if a discharge is motivated, "in part," by the protected activities of the employee the discharge violates the Act even if a legitimate business reason was also relied on. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575 (1976). This "in part" analysis has taken various forms with the "in part" language being modified while the underlying concept remains intact. Thus, the Board has used the following terms in dual motivation cases: "the motivating or moving cause," *The Bankers Warehouse Company*, 146 NLRB 1197, 1200 (1964); "the motivating factor," *Tursair Fueling, Inc.*, 151 NLRB 270, 271, fn. 2 (1965); "the substantial, contributing factor," *Erie Sand Steamship Company*, 189 NLRB 63, fn. 1 (1971); "motivated principally," *P. P. G. Industries, Inc.*, 229 NLRB 713 (1977); "a substantial cause," *Broyhill Company*, 210 NLRB 288, 296 (1974); "a substantial or motivating ground," *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); "in substantial part," *Central Casket Co.*, 225 NLRB 362 (1976).

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5. (Cont'd.)

tual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases. See *Bedford Cut Stone Co., Inc.*, 235 NLRB 629 (1978).

Since its inception, the "in part" test has been perceived by some to be, at least conceptually, at odds with the oft-repeated idea that:

> Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. [*N. L. R. B. v. MaGahey*, 233 F. 2d 406, 413 (5th Cir. 1956). See also *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Compare *Shattuck Denn Mining Corporation v. N. L. R. B.*, 362 F. 2d 466 (9th Cir. 1966).]

A conflict between this concept and the "in part" rationale is seen because, in a dual motivation case, the employer does have a legitimate reason for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by their participation in protected activities. Critics of the "in part" test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

III. The Advent of the "Dominant Motive" Test and the Law of the Circuits

In recent years, various courts of appeals have become increasingly critical of the "in part" analysis. The earliest, most outspoken critic of the "in part" test has

been the First Circuit, which in *N. L. R. B. v. Billen Shoe Co., Inc.*, 297 F. 2d 801 (1st Cir. 1968), examined the Board's application of the "in part" analysis and found it lacking.[6] Fundamental to its rejection of the "in part" test is the court's view that the test ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established.

In an effort to remedy what it viewed as the inequities of the test, the First Circuit began to advance its own process of analysis in dual motivation cases. Thus, in *Billen Shoe, supra*, the First Circuit stated that:

> When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough. [397 F. 2d at 803.]

In other opinions, the First Circuit has termed its test a "dominant motive" (see fn. 6, *supra*) or a "but for" test. *Coletti's Furniture, Inc. v. N. L. R. B.*, 505 F. 2d 1293 (1st Cir. 1977). For our purposes, this test will be referred to as the "dominant motive" test, which, in its most simple form provides that when both a "good" and "bad" reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities,

6. Actually, as early as 1953, in *N. L. R. B. v. Whitin Machine Works*, 204 F. 2d 883, 885 (1st Cir. 1953), that circuit court expressed disagreement with Board analysis in 8(a)(3) cases. Yet, it was not until 1963 that Judge Aldrich of the First Circuit formally initiated the "dominant motive" or "but for" test. See *N. L. R. B. v. Lowell Sun Publishing Co.*, 320 F. 2d 835, 842 (1st Cir. 1963).

the discharge would not have taken place. *Coletti's Furniture, supra* at 1293, 1294; *N. L. R. B. v. Fibers International Corporation*, 439 F. 2d 1311, 1312, fn. 1 (1st Cir. 1971).

Conflict between the Board and the First Circuit in this area has escalated to the point where in *Coletti's Furniture, supra* at 1293, the court stated that "[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." In addition, the conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.[7]

Thus, the District of Columbia Circuit, in *Allen v. N. L. R. B.*, 561 F. 2d 976, 982 (D. C. Cir. 1977), applied an "in part" test, stating that:

> [T]he cases are legion that the existence of a justiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity . . . ."[8]

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7. Although it is responsible for the advent of the "dominant motive" test, which now is found in various forms in the circuits, the First Circuit, in its recent decision in *N. L. R. B. v. Eastern Smelting and Refining Corporation*, 598 F. 2d 666 (1st Cir. 1979), appears to have moved away from the "dominant motive" test as earlier expressed. In *Eastern Smelting*, the First Circuit articulated and applied for the first time the *Mt. Healthy* test set forth in this opinion. In *Eastern Smelting*, however, the First Circuit did not explicitly abandon its "dominant motive" test, nor did it abate its criticism of the "in part" test.

8. An "in part" test has also been applied by the Sixth, Seventh, and Tenth Circuits. See *N. L. R. B. v. Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-*

Several months later, another panel applied the "dominant motive" test as propounded by the First Circuit in *Billen Shoe, supra,* holding that:

> The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one. [*Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. N. L. R. B.*, 564 F. 2d 434, 440 (D. C. Cir. 1977).][9]

Similarly, the Ninth Circuit has applied both a "dominant motive" and an "in part" test.[10] Then, in *Polynesian Cultural Center v. N. L. R. B.*, 582 F. 2d 467, 473 (9th Cir. 1978), that court noted that:

> Several of our cases have said that the discriminatory motive must be the moving cause for the discharge. . . . On the other hand, this court has indicated that it too, on occasion, employs the but-for approach.

Tests which have been applied by other circuit courts fit neatly into neither the "in part" nor "dominant motive" category. For example, in *Waterbury Community*

8. (Cont'd.)

CIO, 570 F. 2d 586, 590 (6th Cir. 1978), cert. denied 439 U. S. 819; *N. L. R. B. v. Gogin, d/b/a Gogin Trucking*, 575 F. 2d 596, 601 (7th Cir. 1978); *M. S. P. Industries, Inc., d/b/a The Larimer Press v. N. L. R. B.*, 568 F. 2d 166, 173-174 (10th Cir. 1977).

9. This "dominant motive" test has also been applied by the Fourth Circuit. See *Firestone Tire and Rubber Company v. N. L. R. B.*, 539 F. 2d 1335, 1337 (4th Cir. 1976).

10. Compare *Western Exterminator Company v. N. L. R. B.*, 565 F. 2d 1114, 1118 (9th Cir. 1977), with *Penasquitos Village, Inc. v. N. L. R. B.*, 565 F. 2d 1074, 1082-83 (9th Cir. 1977).

Antenna, Inc. v. N. L. R. B., 587 F. 2d 90, 98 (2d Cir. 1978), the Second Circuit stated its test as follows:

> The rule of causation applied in this Circuit is that "the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one." . . . The magnitude of the impermissible ground is immaterial . . . as long as it was the "but for" cause of the discharge . . . .

The Third Circuit stated in *Edgwood Nursing Center, Inc. v. N. L. R. B.*, 581 F. 2d 363, 368 (3d Cir. 1978), that:

> [T]he employer violates the Act if anti-union animus was the "real motive" . . . . If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity. . . . On the other hand, if the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory. . . . Thus, if the employer puts forward a justifiable cause for discharge of the employee, the Board must find that the reason was a pretext, and that anti-union sentiment played a part in the decision to terminate the employee's job.

The Fifth Circuit, in *N. L. R. B. v. Aero Corporation*, 581 F. 2d 511, 514-515 (5th Cir. 1978), ruled that:

> [T]he Board is not required to establish substantial evidence that the conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was "reasonably equal" to the lawful motive prompting conduct.

Finally, the Eighth Circuit has held that:

> [T]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity. [*Singer Company v. N. L. R. B.*, 429 F. 2d 172, 179 (8th Cir. 1970).]

We note that our citation of the foregoing cases is intended neither to explain nor vindicate the position expressed by any particular circuit court. Rather, it is intended to demonstrate that in an area fundamental to the Act, namely, Section 8(a)(3), disagreement and controversy are rampant among the various decisionmaking bodies.

IV. The Mt. Healthy Test

As the preceding two sections have demonstrated, the issue of what causation test is to be used to determine whether the Act has been violated in dual motivation cases is now in a position where some view the "in part" test as standing at one extreme, while the other extreme is represented by the "dominant motive" test first advanced by the First Circuit. Despite this perceived polarization, room for accommodation and clarification does exist in the test of causality set forth in the recent Supreme Court decision of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274.

The *Mt. Healthy* case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board, alleging that it had wrongfully refused to renew his contract. The school board presented Doyle with written reasons for their refusal. The two reasons cited were: (1) Doyle's use of obscene language and gestures in the shcool cafeteria, and (2) Doyle's convey-

ance of a change in the school's policies to a local radio station. In his suit, Doyle alleged that the refusal to renew his contract violated his rights under the first and fourteenth amendments. He sought reinstatement and backpay.

The district court found that of the two reasons cited by the school board, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and Doyle was, therefore, entitled to reinstatement and backpay. The court of appeals affirmed, *per curiam*.

The Supreme Court reversed. In a unanimous opinion, the Court rejected the lower court's application of such a limited "in part" test and ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. The Court reasoned as follows:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vin-

> dicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correcteness of its decisions. [429 U. S. at 285-286.]

From this rationale, the Court fashioned the following test to be applied on remand:

> Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U. S. at 287.]

Thus, the Court established a two-part test to be applied in a dual motivation context. Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

This test in *Mt. Healthy* is further explicated by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), a case decided the same day as *Mt. Healthy*. A brief discussion of *Arlington Heights* is helpful in examining the parameters of the *Mt. Healthy* test.

Arlington Heights involved an effort by a real estate developer to obtain a zoning change enabling it to construct a housing development. During the zoning hearing, it became apparent that the new development would be racially integrated. The Village ultimately denied the rezoning and, in response, a group brought suit seeking injunctive and declaratory relief alleging that the decision was racially motivated. The Supreme Court ruled that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." (429 U. S. at 270.)

In reaching its decision, the Court invoked the *Mt. Healthy* test. Thus, the Court, citing *Mt. Healthy*, stated that:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. [429 U. S. at 270-271, fn. 21.]

The *Arlington Heights* decision is instructive in one other respect as well. For in its decision, the Court recognized that efforts to determine what is the "dominant" or "primary" motive in a mixed motivation situation are usually unavailing. In this regard, the Court stated that a plaintiff is not required

> to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. [429 U. S. at 265.]

Assuming for the moment that the *Mt. Healthy* test is applicable to dual motive discharges under Section 8(a)(3), it is evident that *Mt. Healthy* represents a rejection of an "in part" test which stops with the establishment of a *prima facie* case or at consideration of an improper motive. Indeed, rejection of such an "in part" test is implicit in the Supreme Court's reversal of the district court's application of such an analysis.

The "dominant motive" test fares no better under *Mt. Healthy*. While a surface similarity between *Mt. Healthy* and the "dominant motive" test exists in that both reject a limited "in part" analysis and both require proof of how the employer would have acted in the absence of the protected activity, the similarity ends there. For the *Mt. Healthy* test and the "dominant motive" test place the burden for this proof on different parties.

As has been noted, under the "dominant motive" test it is the General Counsel who, in addition to establishing a *prima facie* showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, it is made abundantly clear in *Mt. Healthy* (and was specifically reiterated in *Arlington Heights*) that after an employee or, here, the General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate

that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

The "dominant motive" test is further undermined by the *Arlington Heights* decision. As noted above, the Court in *Arlington Heights* eschewed the "dominant motive" analysis by specifically stating that it is practically impossible to examine a dual motivation decision and arrive at a conclusion as to what was the "dominant" or "primary" purpose or motive. *Arlington Heights*, 429 U. S. at 265. Finally, the shifting burden analysis set forth in *Mt. Healthy* and *Arlington Heights* represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation.

V. Application of the Mt. Healthy Test to Section 8(a)(3)

In the final analysis, the applicability of the *Mt. Healthy* test to the NLRA depends upon its compatibility with established labor law principles and the extent to which the test reaches an accommodation between conflicting legitimate interests. For, as the Supreme Court noted, in unfair labor practice cases:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. [*N.L.R.B. v. Truck Drivers Local Union. No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U. S. 87, 96 (1957).]

Initially, support for the *Mt. Healthy* test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that:

> No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

While the amendment itself does not address the "in part" or "dominant motive" analysis or the allocation of burdens, the legislative history does. In explaining the amendment Senator Taft stated:

> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. [93 Cong. Rec. 6678; 2 Leg. Hist. 1595 (1947).]

The principle that "the employer has to make the proof" is also found in the Supreme Court's decision in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U. S. 26 (1967). In that case the Court was concerned with the burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and

of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in *Great Dane* stated that:

> [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U. S. at 34.]

Thus, both Congress and the Supreme Court have implicitly sanctioned the shift of burden called for in *Mt. Healthy* in the context of Section 8(a)(3).[11]

Indeed, as is indicated by the above quotation of legislative history and the citation of *Great Dane*, the shifting burden process in *Mt. Healthy* is consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in *Mt. Healthy*. Similarly, it is the process used by the Board. Thus, the Board's decisional process traditionally has in-

11. It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense (see fn. 6, *supra*) to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.

volved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether any "legitimate business reason" asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.[12] Thus, while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same.

Perhaps most important for our purposes, however, is the fact that the *Mt. Healthy* procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Supreme Court noted in *N. L. R. B. v. Erie Resistor Corp.*, 373 U. S. 221 (1963), it is fundamental in "situations present[ing] a complex of motives" that the decisional body be able to accomplish the "delicate task" of

> weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct [373 U. S. at 229.]

Mt. Healthy achieves this goal.

Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided

12. The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See, e.g., *Shattuck Denn Mining Company v. N. L. R. B.*, 362 F. 2d 466 (9th Cir. 1966).

with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because it action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, we find it to be of substantial importance that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area. In this regard, we believe that this test will provide litigants and the decisionmaking bodies with a uniform test to be applied in these 8(a)(3) cases.[13]

Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

13. Still an additional benefit which will result from our use of the *Mt. Healthy* test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated.

14. In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the

Finally, inherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the "in part" language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past. For, as noted at the outset of this Decision, our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment. Indeed, it bears repeating that the "in part" test, the "dominant motive" test, and the *Mt. Healthy* test all share a fundamental common denominator in that the objective of each is to determine the relationship, if any, between employer action and protected employee conduct. Until now, in making this determination we frequently have employed the term "in part." But in so doing it only was a term used in pursuit of our goal which is to analyze thoroughly and completely the justification presented by the employer. It is, however, our considered view that adoption of the *Mt. Healthy* test, with its more precise and formalized framework for making this analysis, will serve to provide the necessary clarification of our decisional processes while continuing to advance the fundamental purposes and objectives of the Act.

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14. (Cont'd.)

effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

VI. Application of the Mt. Healthy Test to the Facts of the Instant Case

In the instant case, the General Counsel alleges that Respondent discharged Bernard Lamoureux in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation, asserting that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." The Administrative Law Judge found that Respondent's discharge of Lamoureux violated Section 8(a)(3) and (1) of the Act. For the reasons set forth below, we agree.

The record reveals that at the time of his discharge Lamoureux had been employed by Respondent for over 10 years. He had occupied the position of inspector for 2 years and was considered a better than average employee. Indeed, at the hearing, his work was described as admirable. On the day prior to his discharge, Lamoureux's supervisor, Forte, was instructed by the plant superintendent to "check" on Lamoureux, who had been observed entering a restroom carrying a newspaper.[15] The next morning, Forte discovered certain discrepancies in Lamoureux's timesheet. The timesheet indicated that Lamoureux had been working on certain jobs at the time when Forte had been looking for him the previous day but had been unable to find him at his work station.[16] Upon reporting this finding to his own supervisor, Forte was told that "the offense was a dischargeable offense."

15. Respondent never contended that such conduct violated shop rules.

16. It was conceded that Lamoureux's work activities might legitimately have carried him to other parts of the plant. Nevertheless, Forte did not use the paging system to try to locate Lamoureux, or even check the men's room where Lamoureux was last seen.

Thereafter, Forte was instructed to ask Lamoureux for an explanation. Although Forte did so, the record reveals that Lamoureux's final check had already been prepared when Forte confronted him with the discrepancy. Respondent then rejected Lamoureux's explanation, in which he conceded that he may not have performed the jobs at the times indicated on his timesheet but maintained that the jobs had in fact been performed that day. Lamoureux was promptly discharged, purportedly for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." Respondent conceded that Lamoureux was not discharged for being away from his work station or for not performing his assigned work.[17]

In presenting his *prima facie* case of wrongful motive, the General Counsel demonstrated that Lamoureux had become a leading union advocate, beginning in 1976. During both the 1976 and 1977 election campaigns, both of which were lost by the Union, Lamoureux actively solicited support for the Union among his fellow employees. It is undisputed that Respondent was well aware of his sympathies and activities. Thus, during the 1977 campaign, which like the 1976 campaign appears to have included aggressive electioneering on both sides, Lamoureux was reprimanded by management, allegedly for pressuring an employee regarding the Union.[18] Also, dur-

17. In this connection, we note that Respondent did not seek to determine where Lamoureux had been when Forte discovered him absent from his work station, nor did Respondent seek to verify whether Lamoureux had, as he claimed, performed the inspections indicated on his timesheet. Rather, Respondent simply informed Lamoureux that he was no longer worthy of Respondent's trust.

18. Respondent's witness later conceded that the word "pressure" was too strong.

ing the 1977 campaign, Respondent's supervisors on several occasions directed gratuitous remarks regarding the Union toward Lamoureux, once calling him the "union kingpin." We also note that the discharge took place just 2 months after the 1977 election.

In addition, it can scarcely be disputed that Respondent harbored animus toward both the Union and union activists, including Lamoureux. Respondent's anti-union campaign included, *inter alia*, references to the murder indictment of an official of one of the Union's sister locals in another State, as well as an unsupported claim that Respondent's "chances for survival and growth would be seriously hurt by the presence of a union." In view of the tone of the campaign, along with Respondent's remarks directed specifically to Lamoureux, we agree with the Administrative Law Judge that Respondent displayed considerable animus toward Lamoureux, whom it considered to be the "union kingpin."

The General Counsel also demonstrated that Respondent never previously had discharged an employee under these circumstances, although, as detailed by the Administrative Law Judge, the record shows that employees commonly completely timesheets as Lamoureux had and that such discrepancies had no effect on the accuracy of the system of production control. It also appears that, of the only two other employees ever discharged for violating the rule regarding the falsification of company records, one was discharged for embezzlement and the other for deliberate forgery of sales records in order to collect fraudulent sales commissions.[19] Furthermore, two employees who had deliberately violated the same rule by falsifying their timecards were issued warnings and were not discharged.

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19. Unlike these employees, it was conceded that Lamoureux could not have benefited financially from the discrepancies on his timesheet.

From the foregoing, we conclude that the General Counsel made a *prima facie* showing that Lamoureux's union activity was a motivating factor in Respondent's decision to discharge him. Our conclusion is based on Respondent's union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union election. Also of significance is Respondent's sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature. Such action here is especially suspect in light of Lamoureux's admirable work record and the fact that his timesheet discrepancies neither inured to his benefit nor served to affect detrimentally Respondent's production control system.

We further find that Respondent has failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities. In this regard we note that the record discrepancies were only discovered by Forte following the plant supervisor's directive to "check" on Lamoureux, despite the fact that Respondent had no reason to believe that Lamoureux was untrustworthy. Under the circumstances, such actions suggest a predetermined plan to discover a reason to discharge Lamoureux and thus rid the facility of a union activist.[20] Further undermining Respondent's defense is the evidence which demonstrates disparate treatment. As noted previously, the only instances where discharge was imposed by Respondent as a result of "record discrepancies" were where the employee in question sought to embezzle funds or collect fraudulent sales commissions.

20. See, e.g., *Lipman Bros., Inc., et al.*, 147 NLRB 1342, 1378 (1964), enfd. 355 F. 2d 15, 21 (1st Cir. 1966).

Lamoureux's infraction clearly did not rise to such a level. Indeed, the record demonstrates that such record discrepancies were commonplace and generally resulted in no discipline whatsoever. In those instances where discipline was imposed, Respondent issued warnings or other forms of discipline short of discharge.

Accordingly, for the reasons noted above, we find that Respondent's discharge of Bernard Lamoureux violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, concurring:

I am willing to apply the shifting burden-of-proof standard my colleagues adopt for determining whether a discharge was caused by an unlawful purpose where the discharge may have had more than one cause, not all of them unlawful. This standard may suffice for most cases. However, there may remain a residue, perhaps

small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent. In such cases, it is plainly not the latest event, the most recent purpose, which is the cause of the discharge; rather, it is all of them together, from earliest to latest, which cause the discharge.[21]

Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, then plainly the unlawful motive must be deemed to be part of the cause of the discharge, and the discharge is unlawful. By definition, it took all these straws to break the camel's back, so each of them provides a contribution "but for" which the camel would have survived. It is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act. Thus, the "in part" standard, as distinguished from the "but for" and "dominant motive" tests, is the only criterion which will effectuate the purposes of the statute. As my colleagues note, the legislative history shows plainly that Congress itself struck this balance, and I read *Mt. Healthy* as also in effect adopting this standard.

Thus, my only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, modification may be required.

21. It is the difficulty in singling out one individual cause in such situations which has led to criticism and rejection of a "but for" standard as a measure of cause; there is no logical way to apply a "but for" standard in such cases except to fasten upon the most recent event or motive. See Prosser, "Handbook of the Law of Torts" at 238-239, 4th ed. (1971); LaFave and Scott, "Handbook on Criminal Law," at 249-251 (1972).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4012

RED BALL MOTOR FREIGHT, INC.
Petitioner-
Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-
Cross Petitioner.

Petition for Review of an Order of the National Labor Relations Board

ON PETITIONS FOR REHEARING

(December 1, 1981)

Before AINSWORTH, INGRAHAM and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

JUSTICE TATE
United States Circuit Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4012

RED BALL MOTOR FREIGHT, INC.,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

Petition for Review of an Order of the National Labor Relations Board

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ORDER:

The motion of petitioner for a recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

JUSTICE TATE
United States Circuit Judge

Opposition

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. S...
CLERK

No. 81-1605

In the Supreme Court of the United States

OCTOBER TERM, 1981

RED BALL MOTOR FREIGHT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board, upheld by the court of appeals, properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging one of its employees, Linda Surley, for engaging in conduct protected by Section 7 of the Act, 29 U.S.C. 157.

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 660 F. 2d 626. The decision and order of the National Labor Relations Board (Pet. App. A5-A11), and the underlying decision of the administrative law judge (Pet. App. A13-A33), are reported at 253 N.L.R.B. 871.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1981. A timely-filed petition for rehearing was denied on December 1, 1981 (Pet. App. A85). The petition for a writ of certiorari was filed on March 1, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On March 1, 1982, Justice White denied petitioner's application for a stay of the judgment pending the disposition of the petition.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3.

STATEMENT

1. Petitioner is engaged in the interstate transportation of freight by motor common carrier. On April 6, 1979, during the course of a strike by petitioner's unionized truckdrivers, company official Barkley informed petitioner's unrepresented clerical employees that, effective April 9, they would be placed on "mandatory vacation" until further notice. Employee Linda Surley, who had been with petitioner for approximately nine-and-one half years, asked Barkley whether the clericals could be permitted to take "leave without pay"—rather than vacation time—for the duration of the strike, and Barkley explained that they could not. A second clerical employee asked Barkley whether petitioner would recall the employees by seniority when the strike ended, and Barkley answered that the recall would be based both upon seniority and upon the ability to perform the jobs as they become available. (Pet. App. A14-A15.)

Later in the course of the strike, employee Surley stopped by petitioner's office to pick up her paycheck. While in the office, she complained to her immediate supervisor, Don Yant, about petitioner's policy of forcing the clerical employees to use their vacation time during the strike. (Pet. App. A15.) Thereafter Surley telephoned Yant, advised him that she and employee Cox had heard that petitioner had begun to recall its clerical employees, and asked whether she and Cox could go back to work at that time. Yant replied that petitioner had recalled some 14 employees but stated that Surley and Cox were not as yet needed. Surley "angrily" objected and asked for an explanation, pointing out that she and Cox were more senior than some of the individuals recalled and were "cross-trained" to do their work.

Yant responded that "that's the way it is." (*Id.* at A15-A16.) Thereafter, Yant advised Company official Barkley that he had spoken with Surley and that she was "quite disturbed" that she was not one of the first employees to be called back to work (*id.* at A16).

Surley was recalled on April 18 and arrived at the office at 7:45 that morning, 15 minutes before the clerical employees were scheduled to begin work. After stopping briefly at her desk, she headed for petitioner's coffee shop with employee Cox and, en route, spotted employee Davis already working at her desk. In the presence of Supervisor Yant and a fourth clerical employee, Richardson, she reminded Davis that the latter "should not go to work since it was not yet 8 a.m."—referring to petitioner's enforced policy of eliminating overtime by prohibiting employees from working prior to 8:00 a.m. or after 4:30 p.m. (Pet. App. A16-A17.)

Shortly after 8 o'clock, employee Richardson advised Supervisor West of Surley's remark to Davis. At about 8:15, West relayed that information to Company official Barkley, and also advised him that Surley had not begun work promptly at 8:00. (Pet. App. A17-A18.) Barkley—whose office window faced Surley's work area—observed that Surley was in the work area but was not at her desk and, at 8:25 a.m., went to see her supervisor, Yant. By the time Barkley reached Yant's office, Surley had returned to her desk; rather than discussing the matter with Surley, however, Barkley advised Yant that he did not feel that Surley had been working that morning, and asked whether Yant had heard Surley's remark to Davis about not working prior to 8:00 a.m. Yant confirmed that he had heard the remark, and added that Surley had again complained that morning about petitioner's forced vacation policy. (*Id.* at A18 & nn.5-6.)[2]

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[2]Petitioner, however, had apparently rescinded the forced vacation policy the previous day (Pet. App. A26-A27 n.19).

Between 8:30 and 9:00 a.m., Barkley met with petitioner's Vice Presidents Tittle and Hogan and recommended that Surley be discharged because she had "created a disturbance" that morning, had failed to start work promptly at 8:00 a.m., and had displayed a "negative" attitude by complaining about petitioner's forced vacation and recall policies. After reviewing Surley's personnel file—which indicated that she had been reprimanded the previous November for "chattering," although she had received no subsequent reprimands or warnings—the officials decided to follow Barkley's recommendation. (Pet. App. A19-A20, A21, A25-A26.)

Bypassing petitioner's customary practice with respect to giving advance notice to Supervisor Yant regarding decisions to terminate employees under his supervision, Barkley abruptly summoned Surley to his office that afternoon and fired her. Barkley informed Surley that he had "started watching her" because of her comment to Davis and because of her complaints about petitioner's forced vacation and recall policies, and explained that he was discharging her on account of her failure to "go to work right away that morning" and her "general attitude." (Pet. App. A22 n.16, A23-A24.)

2. The administrative law judge held that Surley's discharge violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), because Company official Barkley and Vice President Tittle admitted at the hearing that the discharge decision was motivated "in part" by Surley's repeated vocal objections concerning petitioner's forced vacation and recall policies—conduct found by the judge to be protected by Section 7 of the Act, 29 U.S.C. 157 (Pet. App. A25-A27).[3] The judge also concluded that petitioner's other

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[3]In so holding, the judge relied on the Board's then-prevailing rule that a discharge motivated even in part by impermissible considerations was unlawful. See, *e.g.*, *Rabco Metal Products, Inc.*, 221 N.L.R.B.

explanations for the discharge—Surley's allegedly disruptive remark to Davis and her asserted failure to commence work promptly on April 18—were pretextual. Specifically, the judge found that Surley's remark was "innocuous, caused no disruption[,] * * * and was completely consistent with [petitioner's] well established policies" prohibiting work prior to 8:00 a.m. (*id.* at A28). The judge found petitioner's reliance on Surley's alleged failure to begin work promptly similarly unconvincing, noting that Barkley had witnessed Surley's asserted nonfeasance without making any effort to investigate or correct it, that Barkley had not followed petitioner's usual procedure with respect to notifying Supervisor Yant of discharge determinations, and that petitioner had in the past merely suspended employees for engaging in even more serious misconduct (*id.* at A28-A29). Accordingly, the judge ordered Surley reinstated with backpay (*id.* at A30-A32).

3. The Board sustained the judge's finding that Surley's discharge violated Section 8(a)(1) of the Act, but rejected his use of an "in part" motivation test in favor of the standard it had adopted in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982). Under *Wright Line*, the Board requires its General Counsel to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," after which the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 N.L.R.B. at 1089. Using that test, the Board

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1230, 1237 (1975). As discussed more fully below, the Board abandoned the "in part" test in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982), a decision that was issued six months after the administrative law judge's decision in this case.

in the instant case found that the record evidence "amply supports the Administrative Law Judge's findings that Surley's growing propensity to engage in protected concerted activities[4] caught the attention of [petitioner's] management, which was then motivated to engage in special surveillance of her work performance and to seize upon her first alleged transgression as a pretext to terminate her" (Pet. App. A8-A9). The Board further found that petitioner had "failed to rebut this showing" and concluded that it therefore had "failed to meet its burden [of showing] that absent Surley's protected activities her discharge would have occurred" (*id.* at A9).

4. In a brief per curiam decision, the court of appeals unanimously enforced the Board's order (Pet. App. A1-A3). The court reaffirmed its prior approval of the Board's *Wright Line* test in *NLRB* v. *Charles H. McCauley Associates*, 657 F. 2d 685 (5th Cir. 1981), and held that substantial evidence supported the Board's finding that petitioner's asserted explanation for the discharge was pretextual (Pet. App. A3).

ARGUMENT

Petitioner challenges the Board's *Wright Line* test for determining whether an allegedly discriminatory discharge is unlawful under the Act. Petitioner's arguments are essentially the same as those advanced in support of the petition in *Wright Line, etc.* v. *NLRB*, cert. denied, No. 81-987

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[4]The Board agreed with the judge that Surley's repeated objections with respect to petitioner's forced vacation and recall policies were protected under Section 7 of the Act (Pet. App. A6-A7). The Board further found that Surley's remark in the presence of other co-workers that employee Davis should not begin work until 8:00 a.m. "was an attempt to induce fellow employees not to perform work for which they would not be paid" and hence was also protected (*id.* at A7). The court of appeals sustained these findings (*id.* at A2-A3), and petitioner does not challenge them here.

(Mar. 1, 1982). The same considerations that warranted denial of the petition in that case call for denial of the present petition as well.

As explained in our Brief in Opposition in *Wright Line*, No. 81-987 (at 5-6, 9-12),[5] the Board has adopted the mode of analysis set forth in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), to determine whether an employee was discharged for protected union activity in violation of the National Labor Relations Act. Thus, once the Board's General Counsel has established that opposition to the employee's protected activities was a "motivating factor" in the employer's discharge decision, the employer will nevertheless prevail if it can show that it would have taken the same action "even in the absence of the protected conduct." *Wright Line, supra*, 251 N.L.R.B. at 1089.

While every court of appeals that has had an opportunity to examine the Board's new test has given general approval to it,[6] the First and Third Circuits have disagreed with the Board on the issue of defining the exact nature of the burden which the employer acquires once the General Counsel has established that opposition to the employee's protected activities was a "motivating factor" in the employer's discharge decision—holding that it is "one of 'production' rather than 'persuasion.' " *NLRB* v. *Wright Line, a Division of Wright Line, Inc.*, 662 F. 2d 899, 904 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982). Accord, *NLRB* v. *Transportation Management Corp.*, No. 81-1537 (1st Cir. Apr. 1, 1982); *Behring International, Inc.* v.

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[5]A copy of that brief has been served upon counsel for petitioner.

[6]See *NLRB* v. *Robin American Corp.*, 654 F. 2d 1022, 1025 (5th Cir. 1981); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F. 2d 442, 446 (6th Cir. 1981); *Peavy Co.* v. *NLRB*, 648 F. 2d 460, 461 (7th Cir. 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905, 909 (9th Cir. 1981); *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547, 550 (8th Cir. 1982)

NLRB, No. 81-1937 (3d Cir. Apr. 7, 1982). But see *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F. 2d 547, 550 n.4 (8th Cir. 1982) ("We have considered the First Circuit's criticisms of the *Wright Line* analytical framework and believe that they are not well taken"). There is no need to resolve that issue here, however, because even though the Board applied the *Wright Line* test in this case (see Pet. App. A8-A9), its ultimate finding that petitioner unlawfully discharged employee Surley would in any event withstand scrutiny under the test advocated by petitioner, which would require a defending employer whose unlawful motivation has been established merely to articulate a legitimate reason for its conduct. As shown at pages 5-6, *supra*, the Board found that the General Counsel affirmatively established that the assertedly legitimate reason offered by petitioner for Surley's discharge—her failure to begin work promptly on April 18—was pretextual, and the court of appeals unanimously agreed (Pet. App. A2-A3).[7]

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[7]For similar reasons, there is no need to determine here whether, as petitioner contends (Pet. 11-13), the *Wright Line* test conflicts with this Court's decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Those cases—which arise under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*)—hold that, after the employee has established a prima facie case of discrimination within the meaning of that statute, the employer is merely required to articulate a legitimate nondiscriminatory reason for its action; this is sufficient to defeat the action unless the employee shows that the reason advanced was a pretext. As noted above, both the Board and the court of appeals here found that the General Counsel had affirmatively established that the reason asserted by petitioner was a pretext.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1982

DOJ-1982-04

Petitioner's Reply Brief

Office - Supreme Court, U.S.
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No. 81-1605

IN THE

Supreme Court of the United States

October Term, 1981

RED BALL MOTOR FREIGHT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF IN RESPONSE TO THE BRIEF IN OPPOSITION FILED BY THE NATIONAL LABOR RELATIONS BOARD

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NECESSITY FOR REPLY

This Court's grant of Certiorari in a closely related case, Cause No. 81-1251, *Connick* v. *Myers* on March 8, 1982; the Third Circuit's further disavowal of the *Wright Line* test, *Behring International, Inc.* v. *N.L.R.B.*, No. 81-1937 (3rd Cir. April 7, 1982); and the specious nature of the National Labor Relations Board's Brief in Opposition herein, compel the filing of this Reply Brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1605

RED BALL MOTOR FREIGHT, INC.,
Petitioner,

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF IN RESPONSE TO THE BRIEF IN OPPOSITION FILED BY THE NATIONAL LABOR RELATIONS BOARD

Since filing the Petition for Writ of Certiorari, March 1, 1982, several significant events have transpired which further emphasize the importance of the issue presented, and the necessity for this Court to resolve that issue immediately. Although as addressed by the National Labor Relations Board ("Board") it would appear to be a question of "form" over "substance", the question of the proper burden of proof in Board cases is

at least as critical, if not more so, than Title VII cases and public employee cases before an unbiased federal judge.

ARGUMENT AND AUTHORITIES

1. *Connick* v. *Myers*, No. 81-1251, Certiorari Granted, March 8, 1982, Is A Related Case.

The *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977) burden of proof standard as contrasted to the *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 240 (1981), *Board of Trustees of Kenne State College* v. *Sweeney*, 439 U.S. 24 (1978) and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) standard for burden of proof is now before the Court in *Connick* v. *Myers*, No. 81-1251, with regard to the dismissal of a public employee. The standard in the private sector under Board control is, Petitioner would submit, of greater importance due to the inherently biased nature of Board proceedings.

By granting certiorari in this cause, the Court could, with finality, establish an appropriate burden of proof in literally all proceedings governing the discharge of employees. Petitioner respectfully submits no justification exists to have one standard in Title VII litigation, *Burdine*, *supra;* a different standard, or the same standard in the public sector, *Connick*, *supra;* and the Board's warped *Wright Line* "test" for cases arising under the National Labor Relations Act ("the Act") under a tortured *Mt. Healthy*, *supra*, application. The burden of proof issue is of critical importance to all employers, and given this Court's review in the public sector, *Connick*, *supra*, Petitioner respectfully submits there could be no more

appropriate time or moment than now to review the standard for the Board governed private sector.

2. The Conflicts and Confusion Among the Circuit Courts of Appeal Are Increasing.

Petitioner adopts in its entirety the argument and authorities emphasizing the nature of the conflicts and confusion among the circuit courts of appeal as set forth in the *Brief Amicus Curiae* filed herein by the Council on Labor Law Equlity. The Board's contention (Brief in Opposition, p. 7) that "every court of appeals that has had an opportunity to examine the Board's new test [Wright Line] has given general approval to it," is patently false and intentionally misleading.

The First Circuit disapproved the *Wright Line* "test" initially in *Wright Line, Inc.*, v. *N.L.R.B.*, 662 F.2d 899 (1st Cir. 1981), and more recently left no doubt whatsoever that *Wright Line* would not be followed in *N.L.R.B.* v. *Transportation Management Corp.*, No. 81-1537 (1st Cir. April 1, 1982). Similarly, in an excellent opinion, *Behring International, Inc.*, v. *N.L.R.B.*, No. 81-1937 (3rd Cir. April 7, 1982), the Third Circuit totally rejected the *Wright Line* "test" and adopted the *Burdine, supra*, standard for burden of proof.

This issue is much too critical to allow the existing conflicts among the courts of appeal to continue. Further the resulting confusion is so absurd that within the Fifth Circuit, the panel of justices, not the law, apparently determines the result. *Contrast: TRW, Inc.* v. *N.L.R.B.* 654 F.2d 307 (5th Cir. 1981) versus opinion below (App. 1-3, 660 F.2d 626 (5th Cir. 1981). Petitioner respectfully submits a writ should issue to resolve these significant and recurring conflicts among the courts of appeals.

3. The Board's Brief in Opposition is Intentionally Misleading.

Apparently to avoid acknowledgement of the propriety of this Petition, the Board's "legal analysis" and "statement" are so erroneous that they can be deemed nothing less than intentionally misleading. The misstatement with regard to "every court of appeals'" approval is explained above. But even more vexing is the Board's attempt to re-align the issue as one of "pretext" rather than "mixed motive". This tactic is not novel and in *Peavey Co.* v. *N.L.R.B.*, 648 F.2d 460, 461 (7th Cir. 1981), the Seventh Circuit denounced such a practice, stating:

> In labeling Peavey's reason as "pretextual," however, the Board relied on the same rationale as did the ALJ...
>
> Peavey's reasons here cannot be labeled as pretextual. As *Wright Line* held, a pretext can be found to exist when the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon... here, however, it is undisputed that Snyder had been disciplined for cause prior to...
>
> Once Peavey's reason for discharge are stripped of the label "pretext", it is apparent it met its burden under the *Wright Line* decision.

Surley's failure to commence work and her growing propensity to goof-off on Company time were factual, were relied upon, and cannot be label "pretextual," even under *Wright Line*.

The factual "statement" is equally misleading. Perhaps the best examples of the misleading nature are:

A. At page 4 of the Brief in Opposition, the Board states that Red Ball discharged Surley, "bypassing Petitioner's customary practice with respect to giving advance notice to Supervisor Yant regarding decisions to terminate employees under his supervision..." The entire record establishes that Yant had never had one of the employees he supervised discharged and that Surley was only the second person fired in the last ten years. (Transcript of Proceedings, pp. 111-112). There was no such "customary practice" which Petitioner allegedly "bypassed".

B. While the ALJ repeatedly credited Tittle's testimony (App. 19-20, 29-30), on the critical issue of intent, the ALJ and the Board totally ignore Tittle's uncontroverted testimony at page 112 of the Transcript to the effect that it was specifically Surley's failure to commence work promptly after a two week strike that resulted in her discharge, and not her alleged "protected activities".

Should Red Ball's Petition for Certiorari be granted, these factual discrepancies and erroneous conclusions can be squarely addressed, factually supported, and under any appropriate standard unequivocally determined that Red Ball lawfully discharged Surley. A writ should issue to resolve this critically important issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that three true and correct copies of the above and foregoing Reply Brief In Response To The Brief In Opposition Filed By The National Labor Relations Board have been served upon the Respondent, The National Labor Relations Board and upon the Solicitor General, Department of Justice, by posting the same in the United States mail, postage prepaid, on this the 12th day of May, 1982 to:

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/s/ JAMES H. BAUMGARTNER, JR.